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Order and Disorder Legal Adjudication and Quantum Epistemology

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ORDER AND DISORDER
LEGAL ADJUDICATION AND QUANTUM EPISTEMOLOGY*

Roberto Bin[†]

Abstract

The central issue of this paper concerns the discretion of judges in the application of the law, discretion that has expanded enormously, since judges are engaged in the direct application of principles drawn from the constitution or even - at times - from other legal orders altogether. Every legal system has its own methods of selecting and instituting judges, but of no system can it be said that they enjoy full democratic legitimacy and may be free to create law at will. Both in the US and in continental Europe many perceive the need to find some strategies that might bring the interpretative discretion under control, seeking suggestions sometimes in the theory of legal sources, sometimes in the theory of legal interpretation. The point of this paper is that no answer can be found because we are asking the wrong questions.

The work is divided into two parts. In the first part, I make use of some hints provided by epistemological reflections of quantum physics theorists, above all Heisenberg. The

* This paper is fruit of research begun in 2009, with some very preliminary reflections taking form in two previously published papers (*Ordine delle norme e disordine dei concetti (e viceversa). Per una teoria quantistica delle fonti del diritto*, in *Il diritto costituzionale come regola e limite del potere. Scritti in onore di Lorenza Carlassare*, I, Naples 2009, 35-60, and *Gli effetti del diritto dell'Unione nell'ordinamento italiano e il principio di entropia*, in *Scritti in onore di Franco Modugno*, I, Napoli 2011, 363-383). However, most of the concrete research was undertaken during a period spent at the *Straus Institute for the Advanced Study of Law & Justice* of New York University, thanks to the generous Fellowship offered to me for the academic year 2011-2012. I am especially grateful to the Institute's director, Joseph H.H. Weiler, for the friendship shown to me and for the opportunity he gave me to benefit from his advice and that of other scholars with whom I shared months of contented work in a highly stimulating environment at 22 Washington Square North.

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critical perspective is that of “ontological materialism”, i.e. the idea that in the process of legal interpretation and application, the interpreter is dealing with a “thing” that exists independent of his/her intervention. In the second part, I attempt to suggest a possible solution to the impasse, exploring the meaning of the institutional dimension of legal interpretation and application.

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1. Introduction

The ambition of this brief essay is to seek a way out of the impasse that bedevils legal theory in our times.

The central issue concerns a judge's discretion in the application of the law, discretion that has expanded enormously, since, as well as the law, judges are engaged in the direct application of principles drawn from the constitution or even at times from other legal orders altogether. With increasing frequency, judges' decisions appear unconstrained, taken on the basis of personal beliefs, rather than embedded in criteria fixed by the legislator. Since the legislator is our system's only authority who is able to lay claim to full democratic legitimacy, any enforcement of public power that is not securely grounded in his instructions appears arbitrary and unacceptable.

The seminal point is this: every legal system has its own methods of selecting and instituting judges, but of no system can it be said that they enjoy full democratic legitimacy. It must also be added that no system exists in which judges are allowed to operate entirely without constraint, free to create law at will. The universally accepted principle is that their function is legitimized precisely by their submission to the law. The law is the expression of Parliament, the highest organ of democratic representation: fidelity to the law is therefore the *medium* which justified the judge's power within a democratic system. If such fidelity becomes opaque, if the judge's evaluations are allowed to be made outside of strict legal controls, if judicial discretion becomes superimposed on that of the legislator, the system no longer holds and the function of the judge loses all justification.

The problem is present in all judicial systems, in each one characterized by features that are typical of the system in question, adapting, as it were, to its cultural "topography". In many systems of mainland Europe, the cultural landscape bears the strong mark of Kelsen's theory of legal sources. It is accepted that the judge can create law, because his sphere of discretion (and creativity) is delimited by the increasingly tight grid (the

“frame”¹) imposed by the hierarchical system of norms. His justification holds for as long as the hierarchical system also holds, and the hierarchical system holds insofar as the constitution confines itself to defining the form – rather than the content – of laws, and insofar as the system is (relatively) closed and (relatively) monolithic. Should any of these characteristics be lacking, it leads to the irreversible loss of the system’s coherence and credibility.

In the English-speaking world, and especially in the United States, the legislator’s sovereignty is traditionally viewed as the “pole star”, the legal mainstay on which the interpreter’s sights are set, and to which the judge must show complete deference. In parallel to this, the common law culture has led to the development of a sophisticated analysis of mechanisms of judicial interpretation, assigning to the technical constraint of legal precedent the solid bedrock to which the interpreter’s discretion must anchor decisions. This deference towards the legislator and his/her “legislative intent” itself provides – as we shall eventually see – an argumentative framework for the theory of interpretation, within which we seek the solution to problems relating to the foundation of and limitations to judicial discretion.

Over recent decades the osmosis between the two systems has become increasingly pronounced, even if it tends to operate in one direction only, that is, from the English-speaking system to the European one. One factor accounting for the one-way flow is undoubtedly the atavistic closure of the American system, so fiercely convinced of its “exceptionalism”. However, another objective factor is far more important: the generally accepted failure of the theory of sources as a framework for explaining the actual function and role of judges. That is to say, it is the gradualist theory of sources itself that has triggered the crisis².

¹ H. KELSEN, *Pure Theory of Law*, trans. from the 2nd ed. by M. Knight, Berkeley-Los Angeles, 1967, 349.

² On events concerning the principle of hierarchy as the ordering criteria of sources, cf. the excellent reconstruction of S. PARISI, *Ascesa, declino e mutazioni della gerarchia delle fonti*, Naples, 2012. For a defense of hierarchy as a regulatory mechanism of sources and norms, cf. instead G. PINO, *La gerarchia delle fonti del diritto. Costruzione, decostruzione, ricostruzione*, in *Ars Interpretandi*, 2011, 19 ss. who arrives at conclusions not so far from those developed herein, and also anticipates some considerations

The pre-eminent role attributed to the constitution in the hierarchy of norms has set in motion two processes that are ungovernable using the old conceptual techniques³. It has introduced into the ordinary task of applying the law, the problem of managing constitutional principles, the value underpinning them, and the balancing mechanisms to which they have become inextricably linked. In parallel, it has assigned to constitutional jurisprudence, in nearly all the systems of mainland Europe, an unprecedented norm-producing role – of norms generated by the constitution and, as such, destined to be set at the same level as the constitution itself.

The destabilizing effect is all too clear. The departure point is a system of legal sources, therefore of *acts*, whose different hierarchical level is justified by the greater or lesser democratic legitimation of the *procedures* that produce them (the *law* prevails over the *administrative norm*, since the former is approved through public debate and parliamentary deliberation, also involving minority interests, while the other *norms* are the result of decisions made by government or agencies without public debate or the participation of opposition forces). The *norms* that the jurist derives from those acts acquire the same hierarchical level attributed to the latter: hence, the norm derived from a law will prevail over a contrasting norm derived from other acts. That is what the theory of sources sets out to do, namely, to resolve *antinomies*, contrasts among norms. Obviously, if the constitution occupies the highest rung of the judicial ladder⁴, then “her” norms must prevail over all other norms in the legal order. Constitutional courts guarantee this primacy, having power to declare illegitimate any law contrasting with

made here, on the recognition of sources of law, tacit abrogation and the annulment of the preceptive value of several rules.

³ On this issue cf. G. TARELLO, *L'interpretazione della legge*, Milan, 1980, 326-339.

⁴ The historical problem is precisely this: whether or not the constitution is a part of the general legal order, and therefore whether or not the judge can draw from it norms to apply to the case at hand. This is by no means a foregone conclusion. In Italy, for example, that the constitution and legislature were “separate spheres” was originally a widespread conviction, perhaps even among the founders themselves (cf. C. MEZZANOTTE, *La Corte costituzionale: esperienze e prospettive*, in *Attualità e attuazione della Costituzione*, Bari, 1979, 149 ss.). In the first suits debated before the Constitutional Court, the Government had assumed the defense of repressive Fascist legislation, sustaining in fact that the constitutional provisions guaranteeing freedom were either preceptive norms that produced the abrogation of preceding laws incompatible with them, or were programmatic laws and, therefore, did not prejudice the legitimacy of any laws in force prior to the Constitution. The issue was resolved by the first sentence of the Constitutional Court (sent. 1/1956), as occurred in the United States with the Supreme Court deliberation on *Madison v. Malbury*.

“her” principles. However, constitutional courts do not hold a monopoly on interpretation of the constitution: as part, indeed the “summit” of the judicial system, every judge is bound to apply and interpret it, deriving norms which should prevail over others.

In the Kelsenian system of sources – and probably in any other theory of sources – this phenomenon is not adequately accounted for. The judge’s creative, “normative” role is tolerable because the judge “applies the law” and creates the “case specific norm” – the norm that is the outcome of his interpretation of the (general and abstract) law, taking account of the particularities of the concrete case under consideration. The law is “a frame to be filled” by the action of interpretation, in “the process of determination which constitutes the meaning of the hierarchy of the legal order”⁵. In the current simplification of Kelsen’s thought, judicial discretion is exercised within the space assigned to the “subsumption/assimilation” of the facts (the case) into the general norm (the law). At times, however, judges are called upon to interpret not legal rules, with more or less detailed provisions for definite states of fact, but constitutional “principles” – norms that do not qualify a certain specific behaviour, but are limited to citing values, goals and interests whose protection and enhancement are expressed as absolute exigencies (“personal freedom is inviolable”), and not yet balanced against other, potentially competing claims. In such cases, the judge’s “discretion” to create new norms is hard to justify in terms of Kelsenian parameters. Therefore, many perceive the need to find other strategies that might bring this interpretative discretion under control, seeking suggestions within different perspectives that reach beyond, or at least complement the theory of sources. Their aim is to cleanse the interpreter’s discretion from a justifiable suspicion of arbitrariness, bringing it back towards a terrain where it can be objectively tested and verified.

It is hardly surprising that recourse is made to the great North American culture of theory of constitutional interpretation, in search of answers capable of reassuring interpreters, by offering more reliable instruments with which to confront this

⁵ H. KELSEN, *Pure Theory of Law*, 349.

unprecedented challenge. However, the answers can be found neither here nor anywhere else, perhaps because we are asking the wrong questions. My essay takes its cue from this hypothesis.

The work is divided into two parts. In the first part, which borrows the title of an article by Laurence H. Tribe⁶, I make use of some hints provided by epistemological reflections of quantum physics theorists, above all Heisenberg. The critical perspective is that of “ontological materialism”, i.e. the idea that in the process of legal interpretation and application, the interpreter⁷ is dealing with a “thing” that exists independent of his/her intervention. Usually a great deal of attention is devoted to interpretation and its methods, while very little is paid to the choice of object. My interest focuses precisely on this phase of the interpreter’s work, for this is when we are most likely to encounter the superimposition of subject and object, which lies at the very core of the epistemology of quantum mechanics. Conversely, “materialist ontology” seems to propose the existence of something, probably a “document”⁸, which constitutes the object of the interpreter’s work. Thus, the latter confronts his/her task in a perspective of a clear separation between “observer” and “observed”, attributing to the former objective characteristics that are reflected in the construction of the interpretation and its justification, hence legitimating them. By contrast, in contesting this ontology, there seems to emerge a “deconstructed” image of judicial interpretation, one for which *entropy* might offer a satisfactory representation.

If my first part appears to lead to highly sceptical conclusions concerning interpreter’s work, in the second part I attempt to suggest a possible solution to the *impasse*. Here again, quantum theory provides me with my initial cue: just as very little can be learnt

⁶ *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 *Harv. L. Rev.*, 1 (1989).

⁷ I often adopt the term ‘interpreter’ to refer generically either to the judge or any other figure engaged in “extrapolating the norm from the legal provision”. Obviously, the task of applying the law typically falls on the shoulders of judges, and so I often refer to them specifically, aware, however, that they are not the only subjects engaged in applying the law, and that probably my remarks could sometimes be applied to all interpreters. In some cases, prompted by the analogy with quantum theory, I use the term ‘observer’, meaning a subject who is different from and counterpoised to the “observed”: but, here too, I am referring to the activity of the interpreter.

⁸ Cf. G. PINO, *La gerarchia delle fonti del diritto*, 4 s.

from the results of a single experiment, not much can be gleaned from the analysis of a single sentence. Furthermore, if science can be said to exist in an institutional framework, this is even truer in the case of law. Thus, I devote the second part to exploring the meaning of the institutional dimension of interpretation and application of law. Above all else, it is the rules governing judgment – the rhetorical relationship between question and answer – which constitute the specificity of the “system” of applying law, and which account for the profound differences distinguishing it from the “production system” of normative acts. The institutional aspect of law envisages constraints and reactions, as well as an ever-present critical contribution that accompanies every decision, comparing it against a host of previous ones, checking its compliance with institutional requirements and rules, and verifying its conformity with the models that define the interpreter’s role. This often anonymous task that allows the system to function can be likened to the wheel on which a hamster runs.

I - What lawyers can learn from modern Physics

2. *Why Physics?*

Perhaps Leibniz was the first to elaborate the idea that the “science of law” is of a different nature to that of the natural sciences, remarking on the “wonderful resemblance” between jurisprudence and theology: “*ubi pro ratione stat voluntas*”⁹. Without doubt, many legal scholars have been deeply envious of the 'exact' and 'objective' sciences. As examples, one may cite Kelsen’s research on an objective theory of law, totally disengaged from metaphysics, as well as the endless debate on the objectivity of legal interpretation. These two instances hint at some differences between the European continental tradition and the common law system, concerning their respective attempts to secure greater objectivity in legal adjudication – differences that will be discussed later in the paper.

⁹ *Nova Methodus discendae docendaeque Jurisprudentiae*, in G. W. LEIBNIZ, *Philosophische Schriften*, (1st ed., 1663-1667), Darmstadt, 1930, p. 294.

However, what these approaches have in common is the postulate of a clear separation between the *object* and the *subject* of legal interpretation/application. A 'legal datum' does actually exist, to be constructed and applied to a concrete case by the legal interpreter. The interpreter is an outside *observer*, detached from both the legal datum and the facts of the case to which he/she has – if possible – to match the legal datum.

Kelsen's *Pure Theory of Law* is enlightening in its Newtonian approach¹⁰. The Pure Theory describes the basic frameworks of the legal order, conceived as a real system in which it is possible to know and depict eternal and unchangeable laws, exactly as Newton conceived the physical world. The legal data dealt with by jurists are produced through well-definable sources: any contrast between them "can and must be solved through interpretation", through clear and accessible criteria, for example, hierarchical primacy or chronological sequence¹¹. The consequence is that the process of legal interpretation is not an overriding concern: it is obvious that courts produce new law connecting legal data with fresh facts, but the 'creative role' of judges is limited by other, higher legal sources. Why should we be concerned about judicial discretion in sentencing? It is neither avoidable in the process of applying general rules to single cases, nor more disturbing than the application of law by administrative agencies. Every source – judicial decision included – has a normative discretion as great as the superior sources allow. The issue of the *validity* of a norm relegates the problem of its interpretation to the background.

The interpretative approach, popular among common-law lawyers, comes from similar epistemological premises. Dworkin's theory of "one right answer" is an enlightening example. I do not wish to enter an argument on which the theoretical debate has been enormous. I prefer simply to focus on a highly significant element of Dworkin's theory: the figure of Hercules – the mythological 'super-justice', who has access to the

¹⁰ Several friends, philosophers of law, have contested that the image I present of Kelsen – and then Dworkin – is overly simplistic and superficial. This is undoubtedly true, but it is not my intention to provide a full representation of two such complex and important authors: I merely wish to cast light upon the surprising convergence of their epistemological premises – in both cases, Newtonian – concerning the relationship between the interpreter and law.

¹¹ H. KELSEN, *Pure Theory of Law*, 206.

maximum of information, knows everything about laws and precedents and is able to interpret them in the light of legal principles, together with his moral judgment, fruit of his objectively valid evaluations. As Dworkin has recently clarified, Justice Hercules, “*given his talent*”, may think not inside-out, as mere mortal lawyers do, but outside-in: “*He could decide what there is in the universe, and why he is justified in thinking that is what there is... He could weave all that and everything else into a marvelously architectonic system*”¹².

It is a dream, of course, but it reveals the epistemological subconscious. The premise is that there is a legal world – made of enacted laws, judicial precedents, theories of justice, moral principles and so forth – which is conceived as a reality beyond the interpreter, an object to examine in order to cast light on its secret normative meanings. The challenge for Dworkin is the same as that of Newton: to develop cognitive instruments efficient enough to discover everything about nature or – for Hercules, J. – about the legal order. Dworkin’s Hercules betrays the same gloomy and wistful disposition as Laplace’s Demon, who is endowed with so formidable an intelligence that he can “*comprehend all the forces by which nature is animated and the respective situation of the beings who compose it*”¹³. He is commonly regarded as a symbol of the Newtonian deterministic view of nature – a physical world dominated by a set of laws not yet fully understood because of the incompleteness of current scientific research. Hercules, J. is the “legal twin” of Laplace’s Demon, both being children of the same epistemology: the “one right answer” to hard cases is not so far removed from hoping to “*embrace in the same formula the movements of the greatest bodies of the universe and those of the lightest atom*”¹⁴.

But quantum theory contradicts Laplace and – I would argue – Dworkin, too.

¹² R. DWORKIN, *Justice in Robes*, Cambridge, Mass.-London, 2006, 54.

¹³ P. S. LAPLACE, *Essai philosophique sur les probabilités* (1814), Bruxelles, 1829⁵, 3 (translated by F. W. Truscott and F. L. Emory, New York, 2007, 4).

¹⁴ *Ibidem*.

Quantum physics has upset some of the basic postulates upon which traditional epistemology was founded. I agree with the following statement of L. H. Tribe¹⁵ (from whom I have borrowed the title of this section):

(M)y conjecture is that the metaphors and intuitions that guide physicists can enrich our comprehension of social and legal issues. I borrow metaphors from physics tentatively; my purpose is to explore the heuristic ramifications for the law; my criterion of appraisal is whether the concepts we might draw from physics promote illuminating questions and directions. I press forward in this endeavor because I believe that reflection upon certain developments in physics can help us hold on to and refine some of our deeper insights into the pervasive and profound role law plays in shaping our society and our lives.

Some of the premises of quantum physics seem to fit legal theory quite well. For instance:

i. The observer acts inside the observed system and is a part of it. When applied to legal interpretation, this assumption means not only that the interpreter's activity defines the object of the interpretation, but also that the system as a whole frames and shapes his/her activity (e.g. through the meta-norms which define the legal effect of legal acts or seek to regulate normative interpretation);

ii. If each observer is a part of the observed system – as Niels Bohr pointed out¹⁶ – all the possible results of observation coexist. When applied to legal interpretation, it means that the non-objectivity of legal interpretation is a structural framework, a characteristic of the system (and not only of the legal one). Many interpretations¹⁷ may coexist: none is objectively true, and the results of an act of interpretation/application

¹⁵ *The curvature of constitutional space: what lawyers can learn from modern physics*, 103 *Harv. L. Rev.*, 1 (1989), 2.

¹⁶ See the essay *Atoms and Human Knowledge* (1955), in *Atomic Physics and Human Knowledge*, Mineola N.Y., 2010, 83 ff. (91 f.).

¹⁷ What interpretation means in quantum physics is a highly debated issue, which one can appreciate from the clear and informed article *Interpretation of quantum mechanics* in *Wikipedia*.

may be predicted only as a statistical inference, by evaluating the body of given interpretations¹⁸;

iii. The observation determines what is to be observed, because the result of an observation depends on what the observer chooses to observe. When applied to legal interpretation, it means that – as explained above – the object of interpretation is not an objective reality, because the interpreter picks and chooses the “legislative object” to construct and apply. Like the world of physics, the legal world does not exist as a deterministic system, but as a set of probabilities or potentialities;

iv. Every act of observation is an irreversible process: this is true for acts of legal interpretation, too. The legislative rule is the source of infinite possibilities of interpretation and application to concrete cases; the single act of interpretation/application limits the potentiality of the legal source but does not fix its meaning forever. It produces a datum (a ‘precedent’) that future decisions have to take into consideration as a possible object of observation.

Assertions of physicists themselves demonstrate that some problems about the objectivity of theories and interpretations do not affect jurists alone. For example: “*The atoms or the elementary particles themselves are not [as] real; they form a world of potentialities or possibilities rather than one of things or facts*”¹⁹; May we not say the same of legal norms? “*What we observe is not nature in itself, but nature exposed to our method of questioning*”²⁰ or “*It is wrong to think that the task of physics is to find out how Nature is. Physics concerns what we say about Nature*”²¹. These remarks may console jurists, traditionally envious of the objectivity of ‘exact sciences’, capable (as these sciences are) of accurate quantitative expression, precise predictions and rigorous

¹⁸ W. HEISENBERG (*Physics and Philosophy. The Revolution in Modern Science*, New York, 1962, 24) adds that “what one deduces from an observation is a probability function, a mathematical expression that combines statements about possibilities or tendencies with statements about our knowledge of facts”.

¹⁹ W. HEISENBERG, *Physics and Philosophy*, 160.

²⁰ *Ibidem*, 32.

²¹ Bohr’s remark is much quoted and its source seems to be A. Petersen in *Bulletin of Atomic Science*, September 1963: see M. FRAYN, *The Human Touch: Our Part in the Creation of a Universe*, New York, 2007, 431.

methods of testing hypotheses²². But they could also warn us against investing too much hope in the possibility of ‘objectivity’ in legal interpretation and adjudication.

3. Quantum mechanics and hard cases: a matter of optical resolution

Quantum physics does not aim to replace traditional Newtonian theory, but to complement it. Newtonian theory describes the ordinary world of our everyday experience very well, but it is not able to explain subatomic physics, which form the field of application of quantum mechanics. Newtonian determinism, with its laws and demonstrations, fails to describe adequately the behaviour of elementary particles, with respect to which it can be said that “the old concepts fit nature only inaccurately”²³. The focus changes, along with the image resolution. We must therefore leave behind the classical schemes and traditional concepts, which “are just a refinement of the concepts of daily life”²⁴, and venture into a new dimension of physics, which cannot be described in terms of the concepts underpinning the language of classical physics.

Something similar may be true in the case of legal science. Mostly, legal activities continue to use traditional anthropomorphic language: the judge applies the law to the case at hand. Mostly, laws are clear and precise enough to deal with ordinary, everyday events.

Problems arise when we are compelled to delve into the activities involved in the adjudication process. The usual and metaphorical image of applying the law to the case cannot sufficiently explain how to deal with “hard cases”, “*when no settled rule dictates a decision either way*”²⁵. Perhaps we are facing new cases, for which there is no legal rule available to refer to, but only some conflicting principles; perhaps we have stumbled upon a “paradoxical” case, an event which makes an exception to the ordinary,

²² However, for a much earlier critique on this point, see J. FRANK, *Law and the Modern Mind*, Gloucester, Mass., 1970 (re-edition of the 1930 volume), 7, which counterposes the principle of indetermination of quantum physics to the myth of exactitude in judicial interpretation.

²³ W. HEISENBERG, *Physics and Philosophy*, 17.

²⁴ W. HEISENBERG, *Physics and Philosophy*, 30.

²⁵ R. DWORKIN, *Hard cases*, 88 *Harv. L. Rev.*, 1075 (1975), 1060.

“orthodox” hypothesis (“*id quod plerumque accidit*”, what commonly occurs²⁶) the law is related to. It could simply be a case of situations unforeseen by law, but similar enough to those it envisages to justify the doubt that their exclusion for legislative discipline might constitute an unacceptable discrimination.

What appears more interesting and to matter most is not how the legal rule is written or whether it is more or less detailed. It is not the quality of the law which makes the difference, requiring an interpreter to go into considerable depth, well beyond the conventional procedure of adjudication. Rather, the difference depends on facts²⁷ and on how precise a degree of definition is required and the consequent interpretation of the defined facts.

The law-maker cannot be asked to reflect faithfully “*the infinite variety of reality*” – I am quoting a metaphysical expression sometimes used by the Italian Constitutional Court²⁸, but was used much earlier by the Eleatic Stranger in the Dialogue with the Younger Socrates²⁹. However, when the identification of individual rights and their limitations is not accomplished by the law, but by the judge, the idea that the legislative branch exclusively has the democratic role of defining the bill of rights may plunge us all into a deep chasm. Legislature should deal with the general, not the specific, while judges largely have to deal only with single cases, since their job is properly “to

²⁶ A clarifying example is offered by a chain of cases decided by the Italian Constitutional Court (sent. 1/1987, 215/1990, 341/1991, 179/1993, 150/1994). That men and women do not have equal roles in procreation is widely known. Consequently, a law that reserves some benefits for breastfeeding children in their first months to the mother only may be justified, notwithstanding a specific constitutional ban on sex-based discrimination: this is nature! But what happens if the child is adopted? Or if the mother is in jail? What if she is severely ill? The chain continues when the Court upholds that the true difference in child feeding is not between women and men, but between an employee and a self-employed worker, who is free to choose when the time is right to stay at home. Is there a way to reduce so much complexity? Yes: recently, an American Court (Southern District of Texas, *EEOC v. Houston Funding II, Ltd. et al*, February 2, 2012) decided that “*lactation is not pregnancy, childbirth, or a related medical condition*”, so that no discrimination about it is actionable under the pregnancy-discrimination laws.

²⁷ “*The law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is in the law nor in the legislator but in the nature of the thing*”: ARISTOTLE, *Nicomachean Ethics*, V, 10 (trans. W.D. Ross).

²⁸ See e. g. sent. 121/1957.

²⁹ “*The differences of men and of actions and the fact that nothing, I may say, in human life is ever at rest, forbid any science whatsoever to promulgate any simple rule for everything and for all time*”: PLATO, *Statesman*, tr. by H.N. Fowler, 294b. See F. SCHAUER, *Profiles, Probabilities and Stereotypes*, Cambridge, Mass.-London, 2003, 28.

*understand the law given the problems thrown up by the case*³⁰. It is true that both legislature and courts have to examine rights. However, each does so with a different focus. This seems to be the point. The legislature views matters as if it were a parachutist above a forest, whilst the court should have more the perspective of a truffle hunter. Judges are compelled to contemplate the particulars that law-makers cannot perceive³¹.

In the case-law of the European supreme courts, for instance, the application of the principle of equality may require an unusually high degree of definition. Sometimes discrimination can impact upon an individual because of factual differences that would appear microscopic to the legislator, even if they might affect an individual to a considerable degree. Putting the legislative rules under the microscope of the test of rationality and proportionality, the judge has *“to bid farewell to a stable and unitary objective world, and even to the mere hope of positing such a world as an idea”*³².

I am talking about choosing a degree of focus able to perceive certain microscopic “entities”: the traditional language adopted to describe the “objective world” is no longer adequate. Likewise, the methods of argumentation classically used in legal interpretation are no longer able to express the reasoning required by the reasonableness standard or the balancing test. That is why quantum physics matters.

When scientists make their observations of subatomic particles, these observations interfere with the behaviour of the particles observed: it is the powerful microscope itself which modifies the “reality” under examination. What matters is not only that the observation disturbs the system being observed and measured, but that *“measurement defines what is being measured. What you get from a measurement depends on what*

³⁰ D. DYZENHAUS, *Incoherence of Constitutional Positivism*, in *Expounding the Constitution. Essays in Constitutional Theory*, ed. G. Huscroft, Cambridge 2008, 138, 149.

³¹ As Blackstone says on equity: *“For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted”* (*Commentaries on the Laws of England*, Introd. § 2. 5).

³² J. LENOBLE, *Law and Undecidability: A New Vision of the Proceduralization of Law*, 17 *Cardozo L. Rev.* 935 (1995-1996), 993.

*you choose to measure*³³. Observations “*are not passive accounting of an objective world but active interactions in which the thing measured and the way it is measured contribute inseparably to the outcome*”³⁴. We are required to shift our attention from the object to the subject of observation and, in the field of law, from the law to the case.

‘Facts’ are objective events, perhaps: ‘cases’ are not. The ‘case’ is a construction of the human mind³⁵. The quantum-approach suggests looking at legal interpreters as a part of the system they are interpreting. We cannot adequately conceive the question of legal interpretation without bearing in mind the cultural and institutional characteristics of the system as a whole. Legal interpretation may be conceived as an institution that includes both the object and the subject of interpretation. The alleged ‘object’ of interpretation (the law) has the weak character of ‘objectivity’, since it is for the interpreter to choose whether or not it is relevant. Like the (quantum) physicist, the jurist, too – as part of the ‘legal system’ – works inside a cultural context that suggests which strategies are to be preferred in order to identify the normative acts that may be relevant for the ‘case’ at hand. The interpretation comes later.

4. Legal Indeterminacy. So What?

Indeterminacy is neither pathology, nor a defect of a legal system. Only if we stay firmly entrenched in some microsystem where few laws govern ordinary facts and hard cases are distinctly rare, can we avoid the vertigo-like sensation of peering through a microscope.

American legal realists and critical legal scholars often strongly denounce the law as radically indeterminate, incoherent and contradictory, expressing serious doubts as to

³³ D. LINDLEY, *Uncertainty: Einstein, Heisenberg, Bohr, and the Struggle for the Soul of Science*, New York, 2007, 155.

³⁴ *Ibidem*, 154.

³⁵ For the contraposition of ‘legal’ facts with ‘real’ facts, the facts of real-life, see G. SAMUEL, *Epistemology and Method in Law*, Aldershot-Burlington, Vt., 2003, 1 f., who (quoting G. G. Granger) remarks on the analogy with ‘virtual facts’, which are abstract constructions of the natural phenomena useful for dealing with laboratory experiments.

the possibility of non-arbitrary adjudicative procedures³⁶. Obviously, indeterminacy reaches its peak with the Constitution and judicial review of laws.

The same happens on the other side of Atlantic, with aggravating circumstances: in Europe, this critical stance seems to have forgotten the historical roots of European constitutionalism. The (relatively) young constitutions of Europe were born with a clear mission: to resolve within the constitution and the constitutional institutions the conflict of values, principles and policies that had previously been left outside the institutions for centuries. Through a strictly restricted suffrage, this conflict had no access to Parliament, but was governed by riots and ensuing crackdowns – the long, endemic civil wars that steeped Europe in blood from the French Revolution onwards. Consequently, the European constitutions are programmatically pluralist, and, therefore, intrinsically contradictory: each principle goes arm in arm with its opposite, each liberty with its limit. The constitution must be a bulwark defending interests and values which have not yet obtained mediation, a compromise solution, or a point of equilibrium fixed by law. Implementation is deferred to democratic interplay and future legislation, on which the constitution imposes binding limitations, while unable pre-emptively to indicate a univocal course to follow. They are “rigid” constitutions, in order to prevent any future elected majority encroaching on the rights, prerogatives and interests of minorities³⁷. Constitutional courts have the job of keeping watch over the Legislature “*in situations of real social tension*”³⁸.

Amazement that constitutions are incoherent and that their judicial application yields questionable results, means to ignore their genesis and the actual purpose for which they were conceived. It is inevitable that, calling into play the highest principles and their balancing, the application of the constitution – in both judicial review and any other ordinary judgement – very often generates hard cases. Constitutional limits to ordinary legislation are defined in highly generic terms, so that the constitutional court

³⁶ See, critically, K. KESS, *Legal Indeterminacy*, 77 *Cal. L. Rev.* 283 (1989).

³⁷ I attempted to develop this analysis of the function of 20th-century constitutions in *Che cos'è la Costituzione?*, *Quad. cost.* 2007, 11 ff.

³⁸ M. TUSHNET, *Weak Court, Strong Rights - Judicial Review and Social Rights in Comparative Constitutional Law*, Princeton-Oxford, 2008, 19.

must sometimes decide using strategies, forms of reasoning and even a language that does not pertain to the customary realm of legal reasoning or traditional lexis. We are far from the ordinary judicial dimension, and “hard cases” arise with great frequency. In dealing with them, however, we do not require a microscope to identify the most minute detail of the “cases”, but a powerful telescope, capable of perceiving – as it were – the “astrophysics of values”, that extremely vague and undefined dimension of the highest constitutional principles. Also in cases of this kind, the hints offered by quantum physics can be illuminating, since it operates equally well for the extremely small and extremely big.

What physicists might suggest is not very different from what many legal theorists remark on. Like scientific research, legal interpretation acts inside a cultural environment. Deep cultural conventions guide the work of the interpreter from the very beginning, i.e. from the choice of what is to be interpreted and applied.

But scientists would add a second suggestion:

Demonstration is not only a matter of logic; it is also the deployment of a variety of modes of representation in the service of problem solving (certain problems and not others, by certain means and not others) and rational persuasion. Someone must persuade other people that a problem about intelligible objects has been solved, given the representations at hand and standards of proof appropriate to them. Rational persuasion is thus historically located, and context dependent...

[R]eductive methods are successful at problem-solving not because they eliminate modes of representation, but because they multiply and juxtapose them; and this often creates what I call productive ambiguity.³⁹

Thus, what jurists sometimes identify as a structural deficiency of legal interpretation (which of course opens the door to the unjustifiable and arbitrary discretion of courts), can appear instead as a stimulating and welcome characteristic of scientific (or

³⁹ E. R. GROSHOLZER, *Representation and Productive Ambiguity in Mathematics and the Sciences*, Oxford-New York, 2007, xi f.

mathematical) demonstration. The cultural context prizes representations and arguments, evaluating their appropriateness and persuasiveness. This is nothing new for legal scholars after the lesson of Perelman and the Hermeneutic school: what is more remarkable is that it is also the conclusion reached by physicists and mathematicians.

How do the ‘exact sciences’ coexist with this scenario? Heisenberg would answer as follows: “*the result of the observation cannot generally be predicted with certainty; what can be predicted is the probability of a certain result of the observation, and this statement about the probability can be checked by repeating the experiment many times*”⁴⁰. Everything shifts from the world of facts “*to a world of potentialities or possibilities*”⁴¹. Perhaps we could use similar words to refer to “norms” that the interpreter obtains from the laws and applies to the case he/she is currently deciding: the result of the interpretation cannot generally be predicted *with certainty*; what can be predicted is the *probability* of a certain result of the interpretation. “*This statement about the probability can be checked by repeating the experiment many times*” – says Heisenberg – because “*the probability function does – unlike the common procedure in Newtonian mechanics – not describe a certain event but, at least during the process of observation, a whole ensemble of possible events*”⁴². It seems to me the same is true also for the law and its interpretation.

Of course, a probability function may not be calculated on the basis of a single event; it is a statistical datum obtained through the observation of several events. This simply means that the more numerous the interpretations are, the more probable the forecasting of future interpretations becomes. Using Heisenberg’s words once more⁴³, we may imagine that the wide range of possibilities an interpretation of a law may produce can quickly be reduced to a much narrower range by the fact that a new interpretation has now been added: each interpretation consolidates a certain probability function.

⁴⁰ *Physics and Philosophy*, 28.

⁴¹ *Ibidem*, 160.

⁴² *Ibidem*, 28.

⁴³ *Ibidem*, 116.

After all, what I am describing through Heisenberg's words is something quite similar to the system of binding legal precedent. To explain how that system works, we could say that "*the most fundamental theory now available is probabilistic in form, and not deterministic*"⁴⁴ (with the leave of Justice Hercules and his "good for all seasons" theory, where each new case finds a precise and univocal solution).

For ordinary cases, we do not need Hercules. The common judge and the traditional methods will suffice – in exactly the same way as Newtonian mechanics is perfectly able to resolve any problem of "normal" physics. By contrast, indetermination is a constant and objective situation that accompanies interpretation and adjudication when examining infinitely small or infinitely big details, as in the hard cases mentioned above. In such situations, the solution of cases is not foreseeable within the normal margins of certainty and reliability. It can only be identified on a probabilistic basis, developing hypotheses to be consolidated a step at a time, with all the uncertainties and undulations arising from the variability of the specific conditions in which each decision is reached.

However, it is not my aim to focus attention so much on these aspects: the problems of interpretation of constitutional principles, their balance, and judgements of reasonableness and proportionality are well-tilled terrains; therefore, the analogy with quantum physics is likely to suggest only a few more metaphors – and besides, the small consolation of reducing the distance between the supposed uncertainty of legal procedures and the proverbial exactness of those of hard science. Rather, my wish is to adopt a "quantistic" perspective to cast new light on the processes of legal adjudication more in general. I shall now attempt to summarise this approach.

In any legal interpretation, interpreters are not completely separate from the objects of their activities; both are part of the same system, the same "institution". The system is

⁴⁴ It is what is remarked, with reference to quantum theory interpretation, in D. BOHM, *Causality and Chance in Modern Physics*, Philadelphia, Pa., 1957, 103.

also made up of rules and customs which advise how the interpreter can recognize as a *valid* and *relevant* act the law he/she applies, and how to construct it in order to obtain the norm to apply to the case at hand. They are ‘institutional’ customs in the sense that they are recognized as valid and binding by those who share the same legal culture. It is for the institution to select which of the many proposed interpretations it prefers as being the most persuasive one, so that a particular interpretative line and no other can prevail as a probability function. Many different interpretations of the same law – for instance, all those emerging from the ongoing battle among precedents, dissenting and concurring opinions, overrulings and so on – are not an overwhelming limit, but an opportunity: “*the resultant polysemy generates not confusion but insight*”, and the insight may produce better results⁴⁵.

In the following parts of this paper, I will be dealing in more detail with only two aspects of this approach, attempting to avoid the entire *mare magnum* called ‘legal interpretation’. I am interested in examining what occurs just before and just after the process of determining the meaning of a legal document in order to solve a legal case. From a “quantum point-of-view”, it is more fascinating to explore how the interpreter picks and chooses the texts to interpret and then apply in adjudication and how he/she justifies the result of his/her interpretative activity.

The first profile is of particular relevance because it makes a point about the strict contiguity between the subject and the object of interpretation (or between the observer and the observed, using the physics glossary). My following section investigates this issue.

To describe my point of view on the motivation of decisions (§ 7), I will use another metaphor borrowed from physics, the concept of *entropy*. Entropy refers to a physical process, the description of which is strictly related to the concept of probability; and probability brings us back to the collective, social and institutional structure of legal interpretation, which is the topic of the concluding part of this paper.

⁴⁵ E. R. GROSHOLZER, *Representation and Productive Ambiguity in Mathematics and the Sciences*, 4.

5. Interpretation of What?

Treatises on statutory construction deal both with rules governing the operation of statutes as regards time and place and their relation to other acts, particularly by way of repeal, and with rules by which the meaning of their language is ascertained. The two sets of rules cannot always be clearly differentiated, for the operation of a statute may depend upon the meaning of its language, and the ascertainment of the meaning of a statute may be affected, if not controlled, by extrinsic rules of law in addition to what may be gathered from grammatical interpretation and context.⁴⁶

Supposing the facts to have been ascertained, decision of a controversy according to law involves (1) selection of the legal material on which to ground the decision, or as we commonly say, finding the law; (2) development of the grounds of decision from the material selected, or interpretation in the stricter sense of that term; (3) application of the abstract grounds of decision to the facts of the case. The first may consist merely in laying hold of a prescribed text of code or statute, or of a definite, prescribed, traditional rule; in which case it remains only to determine the meaning of the legal precept, with reference to the state of facts in hand, and to apply it to those facts... But it happens frequently that the first process involves choice among competing texts or choice from among competing analogies so that the texts or rules must be interpreted – that is, must be developed tentatively with reference to the facts before the court – in order that intelligent selection may be made.⁴⁷

What I propose is not particularly novel. The first step of an interpretation process regards “finding the law”. Whether it is part of or outside the interpretative process is a matter of definition. One could evoke the hermeneutical circle: “*The anticipation of meaning in which the whole is envisaged becomes actual understanding when the parts that are determined by the whole themselves also determine this whole*”⁴⁸. The circle is a fine metaphor, which does not yet clarify how “finding the law” actually operates. As a matter of fact, this phase is normally neglected – left in the shadows, as it were – as if the phase were not a highly relevant or crucial aspect of the adjudication. But it is.

⁴⁶ E. FREUND, *Interpretation of Statutes*, 65 *U. Pa. L. Rev.* (1916-1917), 207.

⁴⁷ R. POUND, *Theory of Judicial Decision*, 36 *Harv. L. Rev.* (1922-1923) 647, 802, 940, 945 f.

⁴⁸ H. G. GADAMER, *Truth and Method*, (J. Weinsheimer & D. Marshall trans.), 2nd ed., New York, 1989, 291.

I would like to focus on some means the judge has at his/her disposal to select the relevant law to apply to the case at hand. To select the relevant law means to choose what is going to be interpreted, “pre-judging” (apologies for the hermeneutical quirk) the subsequent activity of interpreting the chosen texts and construing the norm to apply.

A) The first question is whether a given text may be defined as a *source of law*⁴⁹. The answer may cause some difficulties. Take, for instance, those technical boards (government agencies, independent authorities, the ‘expert groups’ so generously instituted by the EU Commission for managing member states’ compliance with directives⁵⁰, etc.), whose duties are poised on the somewhat ambiguous threshold between guidance and interpretation. Every legal system has a considerable number of such hybrid bodies, and its laws accord them the authority to produce “*interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice*”⁵¹.

As Kelsen might wonder, what is the difference between a properly *legislative* rule and an *interpretative* one? According to the opinion of the courts, the difference depends on a very uncertain criterion: sometimes they deem “interpretative” the rule which does not create “new duties”, sometimes they have regard for the nature of the task conferred, or the degree of discretion exercised⁵². However, it is obvious that a “legislative rule” issued by an authority not legally appointed by law should be set aside⁵³; at the same time, the law itself may be constrained by constitutional limits to the delegation of normative

⁴⁹ I do not consider the hypothesis that the norm derives from a customary *fact-source*, one that seems neither frequent nor of particular relevance to my line of argumentation.

⁵⁰ See S. ANDERSEN, *Non-binding enforcement of EU law: interpretation or centralization and norm assimilation?* (paper: http://euce.org/eusa/2011/papers/2b_andersen.pdf)

⁵¹ *US Administrative Procedure Act*, § 553 (b)(3)(A) 1982.

⁵² See, for instance, the lines of distinction based on precedent in the sentence *Fertilizer Inst. v. United States EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991).

⁵³ So *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Com.*, 874 F.2d 205, 208 (4th Cir. 1989), discussing whether the “Statement of Interpretation” issued by the Consumer Product Safety Commission is in fact an interpretation of an existing regulation, or is properly considered a legislative or substantive rule to be set aside.

power. Courts have to walk a fine line between two alternatives: either to give a strict interpretation of the normative capacity of the act, or declare it⁵⁴ void.

Neither should we forget the twilight world of so-called “soft-law” – a world populated by some legal nightmares, whose vague role is rather undefined, existing somewhere between a form of quasi-contractual self-regulation (proper to a private legal relationship) and a sort of delegated power for specifying some general statutory norms. Free-market ideology encourages this sort of “bottom-up” regulations to blossom⁵⁵. Acts of self-regulation, guidelines of best practices, codes of conduct and many other names denote those normative acts which are emanated by private or quasi-public authorities, sometimes by public authorities as well, for regulating the behaviour of corporations, the relationship with their employees or affiliates, standards of professional conduct and the ethical principles of the profession, consumer rights and so on.

Such regulations are everywhere on the increase, following variable patterns and combinations⁵⁶. Sometimes their “nebulous status”⁵⁷ causes a considerable amount of difficulty for courts: Is best-practice valid grounds for having a legitimate claim of entitlement to a property interest⁵⁸? How has the judge to interpret self-regulation: as a law or more as an agreement⁵⁹? Does compliance with self-regulatory guidelines exempt one from liability?⁶⁰

⁵⁴ ... or its legislative prevision: see e. g. *Patterson v. Daquet*, 62 Misc. 2d 106, 114 (N.Y. Civ. Ct. 1969), declaring unconstitutional “*the amorphous Rent Stabilization Law*” of City of New York for having attempted to impose regulations on the housing industry under the guise of “voluntary” self-regulation”.

⁵⁵ As a good alternative to a fierce deregulation: see for example I. AYRES, J. BRAITHWAITE, *Responsive Regulation: Transcending the Deregulation Debate*, New York, 1992.

⁵⁶ See, for an analysis of the complex classification of self-regulations in the European experience, with a particular attention to the data protection self-regulation, S. SILEONI, *Autori delle proprie regole. I codici di condotta per il trattamento dei dati personali e il sistema delle fonti*, Padova, 2011.

⁵⁷ R.S. LYNCH, *The 1973 CEQ Guidelines: Cautious Updating of the Environmental Impact Statement Process*, 11 Cal. W. L. Rev. 297 (1974-1975), 299.

⁵⁸ See *Lopez v. Admin. Office of the Courts*, 2011 U.S. Dist. LEXIS 127118 (D. Utah Nov. 2, 2011).

⁵⁹ On the evolving opinion of the Italian Supreme Court on this question, see S. SILEONI, *Autori delle proprie regole*, 91 ff.

⁶⁰ See C.C. HAVIGHURST, *Practice Guidelines as Legal Standards Governing Physician Liability*, 54 *Law & Contemp. Probs.* 87 (1991), 105-107; M.M. MELLO, *Of Swords and Shields: The Role of Clinical Practice Guidelines in Medical Malpractice Litigation*, 149 *U. Pa. L. Rev.* 645 (2000-2001), 700-704; J.F. BLUMENSTEIN, *Medical Malpractice Standard-Setting: Developing Malpractice Safe Harbors as a New Role for QIOs*, 59 *Vand. L. Rev.* 1017 (2006), 1036 f.

Through these decisions, the courts define what the law is and what it is not. Sometimes the law itself declares that some acts do not have the force or effect of a legally binding rule⁶¹. Is this enough to answer effectively all questions regarding the actual effect of such acts? What are such acts established and enforced for? Perhaps they work merely as an “interpretative guideline”⁶², but – again – what is the difference between an “interpretative act” and a normative one?

The problem of determining what constitutes a *source of law* can also pose another question. What about those statute rules that courts deem to be without a proper legal effect?⁶³ I am referring to some norms about the interpretation of statutes that are frequently given scant attention by jurists. In the Italian legal system, for instance, the Civil Code includes some rules about interpretation: they have been held from the very start to be a mere summary of the traditional criteria actually applied in interpretation and adjudication. Consequently, many jurists believe that these norms do not have a “prescriptive” but, rather, a merely “re-cognitive” value⁶⁴. It is not only an Italian opinion: Cass Sunstein, writing about the first provisions of the U.S. Code (which

The jurisprudence of the Italian Cassation offers some points of interest in this regard: for example, Cassaz. pen., sez. IV, sent. 8254/2010, counterpoises the conduct that a doctor must maintain on the basis of professional deontological norms against the “guidelines” (or medical protocols), concluding that respect for the latter does not exempt the doctor from liability.

⁶¹ For instance, the EU Treaty says that “Recommendations and opinions shall have no binding force” (art. 288.5 TFEU). In the Italian legislation a minister is sometimes delegated the power to enact “acts without regulatory function” (“*atti di natura non regolamentare*”) of which nobody knows exactly what might be the binding force (see A. MOSCARINI, *Sui decreti del governo "di natura non regolamentare" che producono effetti normativi*, *Giurisprudenza cost.*, 2008, 5075 ff., and C. PADULA, *Considerazioni in tema di fonti statali secondarie atipiche*, *Diritto pubbl.* 2010, 365 ff.).

⁶² In an interesting sentence, the Italian Court of Cassation (Sez. VI pen., sent. 66/2010) used the rules of the deontological code to determine the relationship that must exist between a defending judge and an absconding defendant. The deontological code is not employed as a source of prescriptions, but as an element for knowing the “normal” situation of the relationships in question, and thus as a *de facto* element useful for interpreting the rules on abscondence.

⁶³ One well-known example in Italy concerns many of the more innovative provisions of the Constitution, which were initially considered to be without “preceptive value”: see the critique of V. CRISAFULLI, *Sull'efficacia normativa delle disposizioni di principio della Costituzione* (1948), in *La Costituzione e le sue disposizioni di principio*, Milan, 1952. More recently, it was the Constitutional Court to affirm that many of the rules of the Regional “Statuti”, “even while materially inserted in a source-act, cannot be accorded any legal efficacy, since they are mainly grounded in the opinions expressed by the diverse political sensibilities present within the regional communities at the time of the approval of the statute” (sent. 379/2004).

⁶⁴ See G. TARELLO, *L'interpretazione della legge*, 287-312.

provides a long list of instructions about interpretation) concludes that some of them “reflect implicit rather than explicit interpretive instructions”⁶⁵; and every study on the codification of the rules of interpretation has reached the same conclusion as to their lack of any actual legal effect⁶⁶.

A “deconstruction” of the legal efficacy of some rules is easily detectable in many other legal contexts. For example, it is generally held that any statute prescription that tries to avoid the implied repeal of the statute itself is, in fact, not binding⁶⁷: “*In legal effect, this is no more than a statement of policy and an emphatic statement of the ordinary rule of construction against repeal by implication*”.⁶⁸ A legislature cannot preclude the repeal of any statute by a subsequent legislature: it is a strong (constitutional) principle in both the common law⁶⁹ and civil law⁷⁰ systems. On the other hand, though a statute says that it does not intend to repeal an earlier law, but enacts a rule that is contrary to the previous statute, it may have the effect of repealing it in order to resolve the contrast⁷¹.

⁶⁵ *Law and administration after Chevron*, 90 *Colum. L. Rev.* 2071 (1990), 2107. The *Relazione della Commissione Reale* to the Italian Civil Code (in G. PANDOLFI, G. SCARPELLO, M. STELLA RICHTER, G. DALLARI, *Codice civile (illustrato con i lavori preparatori)*, I, Milan 1939, 24 ff.) used quite similar words, saying that this kind of norm is more likely to “advise” than to “order”.

⁶⁶ How broadly this opinion is shared by the academic world and the courts is described by F. OST, M. VAN DER KERCHOVE, *Entre la lettre et l'esprit. Les directives d'interprétation en droit*, Bruxelles 1989, 21 – 30. See also the R. Dickerson’s examination of the Canadian *Uniform Statutory Construction Act* in *The Interpretation and Application of Statutes*, Boston-Toronto, 1975, 262-281.

⁶⁷ See, for example, Cassaz. civ., sez. trib., sent. 17936/2004. In doctrine cf. L. PALADIN, *Le fonti del diritto*, Bologna, 1996, 88 ff., who comments on sent. 4/1972 e 14/1964 of the Italian Constitutional Court.

⁶⁸ Court of Appeals of Maryland, *Montgomery County v. Bigelow*, 196 Md. 413, 77 A.2d 164 (1950). On the interpretative value of these clauses, cf. L. PALADIN, *Le fonti*, 90. In Italian legal culture, arguments against the tacit abrogation of laws are not widely accredited. Therefore, the general perplexity in according normative efficacy to the express abrogation clauses often appearing in laws is mainly based on the theory of legal sources: cf. P. CARNEVALE, *Riflessioni sul problema dei vincoli all'abrogazione futura: il caso delle leggi contenenti clausole di 'sola abrogazione espressa' nella più recente prassi legislativa*, *Dir. soc.* 1998, 407, esp. 447 ff.

⁶⁹ See, e.g., J. F. BORROWS, *Inconsistent Statutes*, 3 *Otago L. Rev.* 601, 611-613 (1976); E. A. DRIEDGER, *Construction of Statutes*, 2nd ed., Toronto 1983, 229 f.; for plentiful U.S. precedents, see 1A *Sutherland Statutory Construction* § 23:3 (7th ed.). Borrows observes that this doctrine “*would be giving the court a greater degree of discretion than has ever been admitted in relation to a statute. It would also at times involve a holding that Parliament's latest word on the subject was null and void, and this would be too great a derogation from parliamentary supremacy*” (613).

⁷⁰ For an Italian point of view, see A. CELOTTO, *Fonti del diritto e antinomie*, Torino, 2011, 35-37.

⁷¹ See J. F. BORROWS, *Inconsistent Statutes*, 611, quoting Lord Blackburn.

It should be borne in mind that not all that is written in a legislative act has legal efficacy. In any legal system, we can easily find many examples of statute prescriptions that courts deem “declaratory legislation” incapable of constraining the interpreter. For example, in the complex Italian network of relations between state and regional legislation, it is often stated that the provisions of state laws that expressly pre-empt local normative autonomy have no binding authority for the interpreter, since it is for the Constitution (and, consequently, the Constitutional Court), not ordinary laws, to define the boundaries between the two legislatures⁷².

This can also be true of constitutional norms: for example, why does the U.S. Constitution still contain the “three-fifths of a person” clause, when nobody believes that it has a binding role anymore after the XIV Amendment? *“The practice of leaving the Constitution - both in its visible manifestations and in its invisible dimensions - intact to the degree possible, even when new provisions might in theory be treated as erasing what had gone before, serves as an antidote to collective amnesia about national missteps”*⁷³; but this means a deconstruction of the prescriptive force of a portion of the constitutional text itself.

B) A second question is whether a legal act – a truly normative one, regularly enforced – is or is not yet in place and has effect. The issue is how the implied repeal of laws works, given that everywhere it is recognized as a constitutional principle that where two acts are inconsistent or repugnant, the latter will be read as having implicitly repealed the earlier one⁷⁴, for this is an implication of parliamentary sovereignty. In fact, legal traditions differ remarkably as regards how and when the interpreter can declare a law repealed by implication.

⁷² See, among many, Corte cost., sent. 726/1988.

⁷³ L. TRIBE, *The Invisible Constitution*, Oxford - New York 2008, 63.

⁷⁴ See P. B. MAXWELL, *On the Interpretation of Statutes*, 6th ed., London, 1920, 280 f.; E. A. DRIEDGER, *Construction of Statutes*, 226. On this, see the previous remarks of Hamilton, in *Federalist*, n. 78, who observes that the principle of the primacy of the subsequent law is not imposed by any law, but is “a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing”.

Also in this case, civil-law lawyers are used to dealing with the question by invoking the theory of legal sources. The contrast between two laws is an objective fact to be resolved through the chronological criterion – *lex posterior abrogat legem anteriorem*. Obviously, things may be simpler if the legislature explicitly declares that a previous norm is repealed: but such a declaration is not final, because the express repeal or replacement, when it affects only some acts or parts of them, does not prevent the possible contrast of the new statute with other earlier laws or parts of them. However, implied repeal is a common instrument for resolving irreconcilable conflict between norms. Thus, for a European scholar, it seems remarkable that common law judges are so reluctant to use it⁷⁵.

Implied repeal can be seen as a litmus test of the profound difference in how legislative intent is brought to bear in interpreting the law. The judicial “deference” to the legislature is not a fully persuasive argument before a civil-law court, where the “legislative intent” is deemed as an instrument of little value for interpreting the law⁷⁶. *Ratio*, not *voluntas* is what matters: the interpreter has to detect the “objective aim” of the act⁷⁷, what von Savigny called “*der dem Gesetz innewohnende Gedanke*”. Nobody or few in Europe would subscribe to Francis Bennion’s well-known statement: “*An enactment has the legal meaning taken to be intended by the legislator. In other words the legal meaning corresponds to the legislative intention.*”⁷⁸ Perhaps his additional remarks about countries that follow the civil-law tradition are not entirely true: “*the words of legislation are considered approximate ... They are a mere starting point for flights by the judges*”. However, what the German Federal Constitutional Court once said is a common opinion: a statute may be wiser than its father⁷⁹. This is not so far

⁷⁵ As pointed out by K. PETROSKI, *Retheorizing the Presumption Against Implied Repeals*, 92 *Calif. L. Rev.* 487 (2004).

⁷⁶ See M. DOGLIANI, *Il "posto" del diritto costituzionale*, in *Giurisprudenza cost.* 1993, 525. For a comparative survey, see R. S. SUMMERS, M. TARUFFO, *Interpretation and Comparative Analysis*, in *Interpreting Statutes. A Comparative Study*, N. McCormick and R. S. Summers eds., Aldershot-Brookfield, Vt., 1991, 470 – 474.

⁷⁷ See e.g. E. BETTI, *Interpretazione della legge e degli atti giuridici*, Milano², 1972, 261.

⁷⁸ F. BENNION, *Bennion on Statutory Interpretation*, 5th ed., London: LexisNexis 2008, 469 (quoted from R. EKINS, *The Intention of Parliament*, *Public Law* 2010, 709).

⁷⁹ “*Das Gesetz kann eben klüger sein als die Väter des Gesetzes*”: *BVerfGE* 36, 342, 362. This statement comes from O. von BÜLOW, *Gesetz und Richteramt*, Leipzig, 1885, 37.

from the statement of the Italian Constitutional Court, when talking about the “heterogenesis of ends”: the purpose is to distinguish between the original intent of the historical law-giver and the objective *ratio* that the statute currently conveys. Thus, in Italy, some laws – for example, those enacted by the Fascist regime – may be still usable and enforceable to this day⁸⁰.

The democratic nature of the legislative branch and the separation of powers are affirmed in both systems. What perhaps makes an objective difference is that European constitutions grant the constitutional courts a clear, well-defined power to declare the acts of a legislature void on the grounds of their unconstitutionality, so that the problem of the “*counter-majoritarian difficulty*” of the judicial review is less felt. If courts can void a statute, it is easier still to declare it repealed by the legislature itself. On the other hand, the cultural context is relevant, of course, and history makes a difference. But traditions do not change how a question is framed nor that it demands an answer everywhere: how to deal with two inconsistent rules?

The answers are quite different on each side of the Atlantic, though both rest upon on a process of *anthropomorphism*. The European answer makes the law a person who estranges himself from the ‘father’ and acquires his own life⁸¹, ready to adapt to what society requires. The interpreter may not ignore or alter the text, but this establishes nothing more than a negative restraint⁸². The Anglo-American version instead makes

⁸⁰ See, for some historical examples of the interpretative settlement of some Fascist norms with the new constitutional liberties, Corte costituzionale, sent. 8/1956, 5/1962, 9/1965, 87/1966, 114/1967. For a similar example from French case-law, see M. TROPER, C. GRZEGORCZYK, J-L. GARDIES, *Statutory Interpretation in France*, in *Interpreting Statutes. A Comparative Study*, 181.

⁸¹ This point of view is more clearly developed in a common-law perspective, grounded on Hart’s concept of rule of recognition, in J. WALDRON, *Law and Disagreement*, Oxford-New York, 1999, 38-42, who criticizes the abuse of the ‘legislative intent’ argument on the basis of a sharp distinction between deliberating and enacting.

⁸² The idea of a “negative constitution” is present also in American jurisprudence: see F. SCHAUER, *Judicial Supremacy and the Modest Constitution*, 92 *Calif. L. Rev.* 1045 (2004), and, with a clearer reference to the text, *An Essay on Constitutional Language*, 29 *UCLA L. Rev.* 797 (1981-1982), 828 (“Constitutional language can constrain the development of theory, or set the boundaries of theory-construction, without otherwise directing its development. Constitutional language can tell us when we have gone too far without telling us anything else”). For a similar approach in Italian constitutionalism, see R. BIN, *Che cos’è la Costituzione?*, 38-42.

the *Legislature* a person⁸³ who longs to be in control of his own acts, so it is often suggested that an interpreter is coping with a task of “*sophisticated archeology*”⁸⁴ in order to discover the law-giver’s intent. The two worlds, both European and Anglo-American, are populated by shadows; a dense thicket of “presumptions” about the very nature and purposes of the law-maker. “*Something is lost in the personification*”⁸⁵ and anthropomorphism opens the door to an over-simplification of stereotyped images as they are introduced in some lines of argument. The presumption that the legislature is always up to the job of understanding the requirements of present-day society, and is – until proven otherwise – rational and well informed about facts, and may justify a preference for the latterly enacted statute. On the other hand, many common-law arguments⁸⁶ are based on the opposite traditional idea that “*a sufficient Act ought not be held to be repealed by implication without a strong reason*”⁸⁷: the interpreter must, however, defer to legislative intent, presuming that “*the Legislature did not intend to keep really contradictory enactments on the statute-book*”⁸⁸.

Nonetheless, when interpreters are faced with an actual conflict between two laws – a case of “clear repugnancy” between them⁸⁹ – they are called in either case to make a choice: frequent use of implied repeal tends to favour the later law; not using implied repeal will tend to favour the earlier law. In both cases, it is interpreters who choose which act to apply. Obviously, this is a matter of interpretation: it is the first step in the

⁸³ See W. R. BISHIN, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. Cal. L. Rev. 1 (1965), 6: “It is characteristic of the Law Finder to anthropomorphize the legislature and then apply to it the rules devised for individuals”. See also, critically, J. WALDRON, *Law and disagreement*, 42-45.

⁸⁴ T. A. ALENIKOFF, *Patterson v. McLean: Updating Statutory Interpretation*, 87 Mich. L. Rev. 20 (1988), 22.

⁸⁵ M. YAHAV, *Organizations of Law: On the Foundations of the Legitimacy of Legal Systems* (paper JSD – Nyu 2012), 16.

⁸⁶ And perhaps also a general hostility to both judicial and legislative updating: see K. PETROSKI, *Retheorizing the Presumption Against Implied Repeals*, 497.

⁸⁷ P. B. MAXWELL, *On the Interpretation of Statutes*, London 1920^{6th}, 296.

⁸⁸ *Ibidem*. That none of the rationales for the presumption against implied repeals is empirically tenable is (easily) argued by R. A. POSNER, *Statutory Interpretation--in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800 (1983), 812 f..

⁸⁹ That repeal by implication is disfavoured (even *strongly* disfavoured) without a “clear repugnancy” between norms is such a consolidated rule of interpretation, that it is valued a very significant (and not approved) change that the Supreme Court (in *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264) repealed a statute only “clearly incompatible” with a subsequent statute: see J. W. MARHAM jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of "Plain Repugnancy"*, 45 Gonz. L. Rev. 437 (2009/2010).

process of adjudication, where courts select the act they are going to construct and apply.

C) To avoid repealing a statute by implication, the directive suggests attempting the “reconciliation” of inconsistent norms: *“The court may find that each provision deals with a separate subject matter, and that the two can thus be read together without inconsistency or overlap”*⁹⁰.

This is a rule of legal interpretation accepted everywhere, strictly complementary to the chronological criterion which justifies the implied repeal: the narrower the application of implied repeal, the broader the recourse to “reconciliation”. We might add that the broader the recourse to “reconciliation”, the greater the fragmentation of the legal system. The court may find that each provision deals with a separate subject matter, and thus the two norms can be read together without overlap, but also without a common principle. In the Italian legal order, for instance, three different definitions of “craft firm” coexist: each of them is enforceable in a particular field (*sedes materiae*); each of them is a *lex specialis*, where perhaps a *lex generalis* no longer exists. Thus, the reciprocal “coherence” of the single norm is protected, at the expense of the coherence of the legal order as a whole.

There is a further way for courts to state whether a legal act – actually enforced, valid and in place – is “relevant” to the case in hand. *“Many regard generalia specialibus as no more than a rule of construction, the general words being narrowly “construed” to enable their reconciliation with the prior special statute. Yet it really amounts to the engrafting of an exception on to those general words - a necessary process, perhaps, but still one which seems a little more than merely saying what those words mean”*⁹¹.

Whether this approach we are still talking about is, in fact, interpretation, is – once more – a matter of definition. What must be pointed out is that a large tool set is

⁹⁰ So J. F. BORROWS, *Inconsistent statutes*, 601.

⁹¹ J. F. BORROWS, *Inconsistent Statutes*, 616.

available for the interpreter. He/she can select the norm to apply on the grounds of the specific issue regulated, distinguishing between general and special norms, referring the contrasting norms to different *sedes materiae* or dividing the application fields in which law is to be applied on the basis of the competence of the legislatures (e.g. to avoid federal statutes pre-empting state law). We are talking about some decisions of the interpreter which come before taking the “high way” of legal interpretation, where principles and moral values could perhaps come into play. A sharp distinction has been drawn between questions about *application* of laws and questions about their *justification*, the former being related to the (*prima facie*) appropriateness of a norm to the situation described in the case at hand, rather than its validity: that is another question⁹². I find this distinction particularly useful for situating the activities I have dealt with up to now. They frame the “context” of the main course of the interpretation. However, it is an extremely subtle distinction, a fine veil that is unable completely to separate the ‘subject’ from the ‘object’ of interpretation. It is, rather, an argumentative strategy that tends to blur the interpreter’s role in selecting which of the laws in force to take into consideration.

D) Courts can declare whether a legal act – actually enforced, in place, and “appropriate” to the case – is valid or is void because of contrasts with a hierarchically superior legal act. A European jurist may be surprised by the reluctance of American courts to ascertain the contrast between a statute and the Constitution. It might be more a preference in argumentative style than a matter of substance – such a style would be perfectly understandable in the light of the traditional respect for Parliamentary sovereignty, reflecting the lack of an express constitutional authorization of the judicial review of laws. But, as Schauer pointed out, if “deference” urges the court to search for an interpretation far from the possible intents of the legislature, it is not a less aggressive approach than an act of judicial invalidation of a law⁹³.

⁹² K. GÜNTHER, *A Normative Conception of Coherence for a Discursive Theory of Legal Justification*, *Ratio Juris* 1989, 155 ff.

⁹³ It is the conclusion reached by F. SCHAUER, *Ashwander Revisited*, 1995 *Sup. Ct. Rev.* 71 (1995), 97.

However, “deference” to the legislature is in fact a reasonably strong interpretative criterion in Europe, as well. Any European court would share the classic canon of “avoiding” constitutional doubts: *“No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the Constitution”*⁹⁴. It does not only set a rule of judicial restraint for the courts, but above all a criterion for interpreting legal texts adopted in Europe everywhere. *“This Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided”* could be “a cardinal principle”⁹⁵ for any European Court.

The case-law of the European higher courts constantly enforces the rule that a legal text has to be interpreted in conformity with higher legal sources, even if they would never ground that rule on *“the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts”*⁹⁶. Arguments like the *verfassungskonforme Auslegung* (the construction of ordinary legislation in compliance with the Constitution⁹⁷) or the duty of interpreting national law “in accordance with the requirements of EU law”, are considered to ensue from both the canon of systematic interpretation of laws and the hierarchical structure of the legal system. In a recent decision, the EU Court stated: “it is for the referring court, first, ... to establish whether, taking into consideration the whole body of domestic law, both substantive and procedural, *there is no possibility* of reaching an interpretation of its national law with which to resolve the case in the main proceedings in a manner consistent with the

⁹⁴ It is the well-known opinion (delivered by Story) of the Supreme Court in *Parsons v. Bedford, Breedlove & Robeson* (1830).

⁹⁵ As Brandeis stated in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936).

⁹⁶ As the Supreme Court phrases the traditional presumption in *Clark v. Suarez Martinez*, 543 U.S. 371 (2005).

⁹⁷ The Italian Constitutional Law requires judges to try to interpret the statute in accordance with the Constitution before (or instead of) proposing the question of constitutional legitimacy, because *“in principle, statutes are not declared unconstitutional as it is possible to construct them in an unconstitutional way... but as it is impossible to construct them in a constitutional way”*: sent. 356/1996. The same has happened in Germany for years: see, in very much the same terms, BvGE 2, 266 (282: *“ein Gesetz nicht für nichtig zu erklären ist, wenn es im Einklang mit der Verfassung ausgelegt werden kann; denn es spricht nicht nur eine Vermutung dafür, daß ein Gesetz mit dem Grundgesetz vereinbar ist, sondern das in dieser Vermutung zum Ausdruck kommende Prinzip verlangt auch im Zweifel eine verfassungskonforme Auslegung des Gesetzes”*).

wording and purpose of” the European norms⁹⁸. Even in the more “resistant” British legal order it is provided that “*so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*”.⁹⁹

Arguments like these are of particular interest to my research. “*Justification of the decision norm – it has been written¹⁰⁰ - presupposes mutually coherent interpretation of all relevant norms. Through their justification, these norms and their interpretations are connected to other norms that are not directly relevant to the case at hand. Hence, the demand for coherence extends to a wider set of norms than just those of immediate pertinence*”. Coherence is an important value in legal interpretations, and it is also a way to preserve the validity and legal effect of the laws enacted by the legislature. The fact is that the strong relationship which should exist between the case norm and a specific text is about to fade away. This may trigger – even today, after so many years of application of the canon – the doubt that this sort of interpretation can sometimes be a *de facto* substitution of the statute-norm by a norm cooked up by the judge¹⁰¹. A characteristic “disorder within the system” is about to arrive, therefore. But more of this later on.

6. Right Answers and Wrong Questions

‘Applying a law’ is a comfortable metaphor¹⁰². If ‘law’ is a text (the constitution, a statute etc.), it is a ‘thing’. It is obviously impossible to apply a written document to a ‘case’, for that is an abstraction, a description – or a narration¹⁰³ – of facts: it is not another ‘thing’ but an intellectual construction, a ‘thought’. Instead, what is to be ‘applied’ will be a

⁹⁸ Judgment of the Court (Fourth Chamber) in C 97/11 (emphasis added).

⁹⁹ Art. 3.1. *Human Rights Act 1998* (emphasis added).

¹⁰⁰ K. TUORI, *Ratio and Voluntas: the Tension Between Reason and Will in Law*, Farnham, Burlington, Vt., 2011, 165.

¹⁰¹ See L. KUHLEN, *Die verfassungskonforme Auslegung von Strafgesetzen*, Heidelberg, 2006, 11.

¹⁰² On the concept of application, I refer the reader to the interesting essay by G. PINO, *L'applicabilità delle norme giuridiche*, *Diritto e questioni pubbliche*, 11/2011, 797 ff.

¹⁰³ Cf. M. TARUFFO, *Il fatto e l'interpretazione*, in *La fabbrica delle interpretazioni*, B. Biscotti, P. Borsellino, V. Pocar and D. Pulitanò eds., Milan, 2012, 123 ff., 127.

‘norm’, the rule which the interpreter obtains from texts. The question is from which text and, chiefly, from how many texts? The idea that a legal rule has its roots in a single specific text is, properly speaking, merely an abstract hypothesis. In most cases, the rules to apply stem from a combination of more than one text only (and from something else, as we shall see below).

Read, for example, the rule stated by the European Court of Justice in a recent case¹⁰⁴:

In circumstances such as those at issue in the case in the main proceedings, the third indent of Article 23(1) of Council Regulation (EEC) No 4253/88 of 19 December 1998 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993, read in conjunction with Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993, constitutes a legal basis enabling national authorities to recover from the recipient – without there being any need for authority to do so under national law – the whole of a subsidy granted from the European Regional Development Fund (ERDF) on the ground that, in its capacity as ‘contracting authority’, within the meaning of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Council Directive 93/36/EEC of 14 June 1993, the recipient has not complied with the requirements of that directive so far as concerns the award of a public service contract whose purpose was the implementation of the operation for which the recipient was granted the subsidy.

Reading a norm “in conjunction with” is a common praxis and a valued canon in every legal order, even if only in those legal orders that combine a multi-layered system with a low level of codification of statutory law are we able to attain the complexity of the EU legal order, as in the rule above. However, it seems to be a common opinion that a text is

¹⁰⁴ In Case C-465/10.

to be read “in conjunction with” the later amendments, the rules that implement its provisions, the norms which give the definition of terms in use, the principle and the rules coming from higher legal sources, the international agreement – and the judicial precedents, of course¹⁰⁵. In the end, what the interpreter is going to have to apply is not a text, but something more like a puzzle.

In these circumstances, the process of legal text-finding is so closely connected to the process of legal text-interpreting that the two tend to overlap. Heisenberg’s *Uncertainty Principle* may remind us of the impossibility of distinguishing one process from the other – their “complementarity” – as well as the inescapable and unforeseeable influence that the interpreter exercises on the object of his interpretation¹⁰⁶. However, the language tends to blur the crucial role of interpretation in the choice of object of legal interpretation. Language is a problem, also in physics:

The concepts of classical physics form the language by which we describe the arrangement of our experiments and state the results. We cannot and should not replace these concepts by any others.¹⁰⁷

The concepts of classical physics are just a refinement of the concepts of daily life and are an essential part of the language which forms the basis of all natural science. Our actual situation in science is such that we *do* use the classical concepts for the description of the experiments, and it was the problem of quantum theory to find theoretical interpretation of the experiments on this basis. There is no use in discussing what could be done if we were other beings than we are¹⁰⁸.

¹⁰⁵ “Judicial precedents are texts too”: A. VERMEULE, *Judging under Uncertainty. An Institutional Theory of Legal Interpretation*, Cambridge, Mass.-London, 2006, 9. Arguing that a legal precedent, fixing a new general norm that can dispose of the case in front of later judges, changes the body of law the judge has to interpret, becoming “part of the repertoire of legal resources available for dealing with the cases that come before him”, J. WALDRON, *Stare Decisis and the Rule of Law: A Layered Approach* (NYU School of Law, Public Law Research Paper No. 11-75), 23 and 25.

¹⁰⁶ See my *Ordine delle norme e disordine dei concetti (e viceversa). Per una teoria quantistica delle fonti del diritto*, in *Il diritto costituzionale come regola e limite del potere*, Scritti in onore di Lorenza Carlassare, I. G. Brunelli, A. Pugiotto, P. Veronesi eds., Napoli, 2009, 35-60, in which I anticipated some of the themes I develop here.

¹⁰⁷ *Physics and Philosophy*, 18.

¹⁰⁸ *Ibidem*, 30.

The language of physics is mathematics, nothing comparable with the language of jurists, which is - or should be - rational argument. That our legal language can be defined as a “refinement of the concepts of daily life” is surely less unsettling than the same statement delivered by a Nobel Prize winner for physics. The dense landscape of presumptions and personifications our language usually employs is a part of the daily-life concepts used for developing arguments rationally. Since we do not use mathematics, how rational an argument is, depends on the appreciation of the legal community.

From an external point of view, for instance, the presumption of rationality, coherence and consistency of a law-maker might make one smile: but they seem to be strong paradigms of legal science¹⁰⁹. Perhaps the reason is not only the obvious economic advantage of using some preformed formulas which make it easier to put reasoning into words. Maybe it is a desire for objectivity which drives interpreters. Postulating some qualities of the law or of its giver, the interpreter can hide his own responsibility for deciding the act to apply in the case: presumptions and other “paradigms” turn his choices into an incontrovertible fact.

I suspect that Justice Hercules uses these deceptions. Is the One Right Answer another example of escaping responsibility? My answer is affirmative. An old, renowned and very experienced Italian academic and barrister of the past century (Francesco Carnelutti) once said that in a civil trial there are three different interests: those of the two litigants – each claiming a decision on merit – and the interest of the judge himself to free himself of the case without necessarily taking a decision¹¹⁰. In order to prevent this, the civil codes of the Enlightenment resorted to the norms of interpretation that are still in force today. The *Code Civil Napoleon* punishes the judge who refuses to rule on the pretext of the silence, obscurity, or insufficiency of the law, “*comme coupable de*

¹⁰⁹ See F. OST, M. VAN DE KERCHOVE *Rationalité et souveraineté du législateur, “paradigmes” de la dogmatique juridique*, in *Riv. Int. Fil. Dir.* 1985, 227-251, and in F. OST, M. VAN DER KERCHOVE, *Jalons pour une théorie critique du droit*, Brussels, 1987, 97-134.

¹¹⁰ “*Ma il giudice che interesse ha a spendere tempo e fatica per conoscere e per decidere? Il suo interesse, manifestamente, è quello di attendere agli affari propri*”: F. CARNELUTTI, *Istituzioni del nuovo processo civile italiano*, I, Roma, 1951⁴, 187.

déni de justice”¹¹¹. Most of the rules that *apparently* discipline legal interpretation – like art. 12 of the *Preliminary dispositions* of the *Italian Civil Code*¹¹² – are in effect committed to compelling courts to reach a decision in all cases¹¹³.

The prohibition of declaring a *non liquet* is “a *fully established principle both of jurisprudence and arbitral and judicial practice*”¹¹⁴. The principle was clearly affirmed by the US Supreme Court, at the beginning of its history: “*We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.*”¹¹⁵. Correctly, Julius Stone observed that “*for even though to some minds the non liquet issue may seem so minute that even its very existence is controverted, it may be that this minuteness indicates not triviality, but rather that we are here approaching the fundamental structure of the law*”¹¹⁶. In modern legal systems, the judge cannot evade his basic duty of adjudicating. Judges have “*the honorable but also uncomfortable*” task to “*answer relevant questions within their province with a definite yes or no and that for them there is no ‘We don’t know’ or ‘We will not know’.*”¹¹⁷ Even if “*the impossibility of a non-liquet under a legal system cannot be asserted on a priori grounds*”, since “*logically open legal orders are*

¹¹¹ Art. 4 of the *Code civil* still now in force.

¹¹² “*In applying statutes no other meaning can be attributed to them than that made clear by the actual significance of the words, according to the connection between them, and by the legislative intent. If a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters. If the case still remains in doubt, it is decided according to the general principles of the legal order of the State*”. I am transcribing the translation by A. M. RABELLO, *Non Liquet: From Modern Law to Roman Law*, 9 *Isr. L. Rev.* 63 (1974), 66.

¹¹³ See G. GORLA, *I precedenti storici dell’art. 12 disp. prel. del codice civile del 1942 (un problema di diritto costituzionale?)*, *Foro it.* 1969, V, 112 ff.

¹¹⁴ H. LAUTERPACHT, *Some Observations on the Prohibition of Non Liquet and the Completeness of the Legal Order*, in *Symbolae Verzij*, présentées au professeur J. H. W. Verzijl à l’occasion de son LXXX-ième anniversaire, La Haye 1958, 198. For an examination of the historical roots and a comparative view on the prohibition of *non liquet*, see A. M. RABELLO, *Non Liquet: From Modern Law to Roman Law* (quoted above).

¹¹⁵ *Cohens v. Virginia*, 19 U.S. 264 (1821). Today, however, the extension of the discretionary power of the Court to decide which cases to deal with (see § 9) seems to demonstrate that the Supreme Court is no longer concerned about the *denial of justice*: cf. H. W. PERRY Jr., *Deciding to Decide. Agenda setting in the US Supreme Court*, Cambridge, Mass. – London, 1991, 36 f.

¹¹⁶ J. STONE, *Non Liquet and the Function of Law in the International Community*, 35 *Brit. Y. B. Int’l L.* 124 (1959), 124.

¹¹⁷ O. von BÜLOW, *Gesetz und Richteramt*, quoted from the trans. by J. E. Herget and I. Wade, *Statutory Law and the Judicial Function*, in 39 *Am. J. Legal Hist.* 71 (1995), 76.

*conceivable*¹¹⁸, what is a *logical* openness of the legal order, is not likely to become also an *empirical* phenomenon: *rectius*, it *shall* not – at least not in the modern legal system. As Cover pointed out, referring to the “*irony of jurisdiction*” in *Marbury v. Madison*, “every *denial of jurisdiction on the part of a court is an assertion of the power to determine jurisdiction and thus to constitute a norm*”¹¹⁹. In any case, the judge has to give the answer.

The *One Right Answer* is a consequence, but it does not describe what is actually done – even if only in the imaginary world of Hercules J. Rather, it expresses what every judge *ought* to do in his/her daily professional activity¹²⁰. There is an obligation upon the judge to pass judgment, giving an *answer* to the parties; and he/she can give only *one* answer, since the judgment cannot be equivocal – otherwise such an adjudication would be tantamount to a refusal to adjudicate. Were this the case, the judge would infringe his/her *institutional* duty, and the institution would have to react by reversing the decision. The same may happen when the judge’s answer is *wrong*.¹²¹ Not Hercules, but any judge is required to provide one full answer to the question the litigants pose to him/her: it *must* be given, *must* be univocal, and *must* be the *one* the judge believes to be *right* – and the motivation must seek to convince that the judge could have given no better answer. This is the *institutional duty* of the judge, as a judge – an ordinary judge, not a mythological one.

¹¹⁸ See I. TAMMELO, *On the Logical Openness of Legal Orders - A Model Analysis of Law with Special Reference to the Logical Status of Non Liqueur in International Law*, 8 *Am. J. Comp. L.* 187 (1959), 202.

¹¹⁹ R. M. COVER, *The Supreme Court 1982 Term. Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4 (1983), 8 (n. 23). Judicial ‘duty’ “is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer”: *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1869), quoted by H. WECHSLER, *The Courts and the Constitution*, 65 *Colum. L. Rev.* 1001 (1965), 1005.

¹²⁰ See M. BARBERIS, *Filosofia del diritto. Un'introduzione teorica*, Torino, 2005², 223 f.

¹²¹ See O.M. FISS, *Objectivity and Interpretation*, 34 *Stan. L. Rev.* 739 (1982), 747-749.

7. “*Penumbra of uncertainty*¹²²”, the *Wonderland of Entropy*

However, all the opponents of the Copenhagen interpretation do agree on one point. It would, in their view, be desirable to return to the reality concept of classical physics or, to use a more general philosophic term, to the *ontology of materialism*. They would prefer to come back to the idea of an objective real world whose *smallest parts exist objectively* in the same sense as stones or trees exist, independently of whether or not we observe them¹²³.

But the atoms or the elementary particles themselves are not as real; they form a world of potentialities or possibilities rather than one of things or facts¹²⁴.

We can look at the same problem – the “right answer” – from two different points of view: from the institutional one, in which we can appreciate the “world of potentialities or possibilities” through an overall view of the cases of interpretation and application of a norm; or from an individual one, where the norm that dictates the decision is represented as a “derivation” from one or more texts. I will begin with the second perspective (leaving the first until later).

The “*ontology of materialism*” applied to legal interpretation suggests the image of deriving (“*subsuming*”) the decision from a general norm, which is rooted in one or more texts. If – as I have argued earlier – texts are things but norms are not, we should focus our attention on the intellectual process of transferring what is outside our mind to what is inside it and, then, do the opposite: transfer what is inside our mind to what is outside. Outside means a new text, which is the motivation of the decision, the document which contains its justification.

For depicting the first phase – outside to inside – another metaphor derived from physics may again help us understand. This is *entropy*.

¹²² This expression is quoted from H.L.A. HART, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593 (1957), 607.

¹²³ W. HEISENBERG, *Physics and Philosophy*, 102 (emphasis added).

¹²⁴ *Ibidem*, 160 (already quoted).

Entropy is a physical phenomenon connected with the second law of thermodynamics (over a period of time, differences in temperature, pressure, and chemical potential tend to equilibrate in an isolated physical system), and with it shares all the ambiguities¹²⁵. Entropy is concerned with information, because the process reduces the state of order of the initial systems, and therefore entropy is an expression of disorder or randomness. For instance, if you mix a glass of red wine with a glass of warm water, in the (revolting) blend obtained the original quality (colour, temperature etc.) disappears; you have lost the information and the process cannot be reversed.

Why is legal interpretation related to entropy? Because in our mind data imported from outside are manifold, coming from several sources, and in the mixture they form, the original information tends to vanish¹²⁶. Interpreting thus causes disorder. A few examples may clarify the argument.

Interpreting a text “in accordance” with some other source is – as said before – a normal and recommended practice, which serves to avoid conflicts with other norms. The product of this procedure is a norm that can no longer be ascribed to a specific text. There is an evident shift from the ‘*literal*’ meaning of the interpreted text to a different, ‘*artificial*’ meaning. The motivation of the decision will probably justify this interpretative strategy. It appeals to the presumption of the “coherent law-giver”, who certainly would not wish to contradict a superior norm, or subvert the hierarchy of sources. However, entropy can obscure the information about the sources from which the norm is derived.

¹²⁵ See for instance the well-known essay A. BEN-NAIM, *Entropy Demystified. The Second Law Reduced to Plain Common Sense*, World Scientific Publishing Co. 2007, where the term entropy is challenged and the suggested replacement is “*missing information*”.

¹²⁶ As COVER (*Nomos and narrative*, 18) remarks, “*precepts must ‘have meaning,’ but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking. Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion*”.

A similar process is also seen when a superior norm (for instance, a constitutional one) is interpreted “in the light of” inferior legislation¹²⁷. What some crucial terms used by a constitutional text – like ‘family’, ‘contract’, ‘property’, ‘house’, ‘press’ etc. – actually mean, cannot be explained through ordinary, everyday language. Instead, the meaning depends on how the legal order gives sense and form to the matching legal concepts. It may be that the transfer of meaning tends to petrify (*Versteinerung*) the original meaning, or that the dominant interpretative trend favours an evolutionary interpretation of constitutional law. However, entropy blurs the information and obscures the original hierarchical order of sources.

Defining anything can be a tricky matter; defining legal terms is particularly challenging. For example, the European Court of Justice has always been concerned that certain definitions of key concepts of European law can be interpreted differently by national legal systems. Thus the Court itself will not refuse to examine a question referred for a preliminary ruling by a national court, even if the main proceedings relate to situations governed by domestic law and not directly by EU law. The rationale is that “*it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply*”¹²⁸.

Notions, standards, rationale, models of reasoning or ways of balancing between conflicting interests, data (whether technical or from everyday experience) and means for evaluating professional behaviour: all these and many other sources form part of the process of identifying concepts and notions. In this way, too, any code of ethics, ‘soft’ law, or precedent laid down by foreign or international courts can matter. All such

¹²⁷ See W. LEISNER, *Von der Verfassungsmässigkeit der Gesetze zur Gesetzmässigkeit der Verfassung*, Tübingen, 1964; O. MAJEWSKI, *Auslegung der Grundrechte durch einfaches Gesetzesrecht?*, Berlin, 1971. In the Italian context see G. ZAGREBELSKY, *Appunti in tema di interpretazione e di interpreti della Costituzione*, in *Giurisprudenza cost.* 1970, 904, 913 – 915; A. RUGGERI, *Alla ricerca del fondamento dell’interpretazione conforme*, in *Interpretazione conforme e tecniche argomentative*, M. D’Amico and B. Randazzo eds., Torino, 2009, 388 ff., 399 s.

¹²⁸ Case C-267/99 (“Adam”), on which see M. E. BARTOLONI, *Interpretazione di norme comunitarie al fine di accertare il significato di norme interne: in margine alla sentenza Adam*, *Rivista di diritto internazionale* 2002, 143.

“information” is vital, to understand the relevant factual data, check the prognosis about casual relations, and restrain the discretion of the judge. A legal norm cannot be interpreted without taking into account the actual workings of the institutional and judicial relations to which it is applied. Praxis, for example, sets up a certain balance among institutional organs (just as among market operators or contracting parties), giving form to the relational network to which a legal norm is applied. The meaning assumed by a given rule closely depends on the *de facto* situation to which it refers; the very language reflects the latter’s influence. Such real situations are perceived by the interpreter, who is often tempted to mask the subjectiveness of his/her perception by employing expressions that aim to “objectify” it: conventions, customs, normative facts, material constitution, soft law, and other similarly equivocal expressions are hallmarks of the process of de-responsabilization of the interpreter through the hypostatization of norms¹²⁹. Consequently, the problem is posed of whether such expressions indicate further “sources of law”, and of what position they occupy in the hierarchy of sources. This is because the work of the interpreter seems only to be justified by setting in the order of sources all of the elements determining the “derivation” of the case norm.

How legal sources are organized by law barely matters, on the contrary. One example may be enough to make the point.

Before the Lisbon Treaty, in accordance with Article 34(2)(b) EU, “framework decisions” on police and judicial cooperation in criminal matters did not have a “direct effect”: in practice, national courts were forbidden to apply those norms to the case in hand without an implementing law present within the national legal order. It was an exception to a venerable principle enshrined in the case-law of the European Court of Justice that, when an EU norm establishes an individual right and does not call for additional measures, either national or European, the individual can invoke this norm before the national judge. In a well-known case, the ECJ declared that, even if the “framework decision” at issue had not directly applied, the judge could have obtained

¹²⁹ On this process, I refer the reader to *L’ultima fortezza. Teoria della Costituzione e conflitti di attribuzione*, Milano, 1996, 49 ff.

the same result by way of interpretation: “*The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision*”. But then, the EU norm too “*must thus be interpreted in such a way that fundamental rights... are respected*”¹³⁰.

Different needs and priorities inform what the judges do. The more judges have to deal with the cluster of norms and principles (dealing with such matters as the EU relationship with member states, the legal force of the EU acts, the guarantee of individual rights as defined by the EU, the national and the ECHR and its case-law and so on), the more entropy increases.

Common sense suggests that entropy is an irreversible process: “*eggs break, but they don’t unbreak*”¹³¹. What the motivation of a decision can do is explain how and why the interpreter has reached a conclusion, or how the interpreter has established a general norm from enacted texts. But is any judge able to ‘re-create’ precisely the complex mass of information which he/she has used in order to reach a conclusion? Is the judge capable of allocating the exact argumentative weight to each source influencing the decision, whether mentioned or not in the rationale? What a judge ate for breakfast may have some weight too, as a matter of fact.

II – Judges and Hustlers

8. “*Law is what judges say it is*”, but judges are what laws say they are.

The above frequently repeated quotation of American legal realists is the inescapable premise of many sceptical approaches to legal interpretation. Although I have previously emphasized the role of the interpreter in identifying and choosing the law to be interpreted, it does not follow that I am in full agreement with the sceptics. By no means.

¹³⁰ Case C-105/03 (“*Pupino*”). The invitation to override what ordinary statutory interpretation would yield is, in substance, a weak form of judicial review: see M. TUSHNET, *Weak Court, Strong Rights*, 26.

¹³¹ B. GREENE, *The Fabric of the Cosmos: Space, Time, and the Texture of Reality*, New York, 2004, 13.

The activity of courts and interpreters should be seen as a part of a greater whole. No decision or interpretative statement can be understood and appreciated in isolation, outside an institutional framework¹³². Inside the institution, many strategies are provided to guide the procedure of choosing the relevant normative texts, to combine and interpret them and to resolve any possible conflict between norms. Inside the institution, styles of reasoning, models of legal argument and every other aspect of adjudication are produced, evaluated, criticized, altered and improved. Within the institution it is possible to predict the *probability* of certain results of interpretation and to outline hypotheses on its evolution. Norms (as a product of textual analysis and interpretation) and judges are both parts of that institution, not to mention ‘legal science’¹³³ as well.

The institutional approach is frequent. Recently, for instance, an “*institutional turn*” in the interpretive theory of law was invoked by Adrian Vermeule. His starting point was a critique of the current theories on legal interpretation, since “*a certain blindness or insensitivity to institutional considerations*”¹³⁴ pervades such theories. The institutional dimension of interpretation brings to bear the “*real-word capacities*” of the relevant actors – legislatures, agencies, courts, litigants and citizens – in the legal system. To address this matter, the appropriate question to put at this stage is this: “*How should certain institutions, with their distinctive abilities and limitations, interpret certain texts?*”¹³⁵

Vermeule's approach calls into criticism for their “nirvana fallacy” many of the better-known interpretative theories, which appear to result in an almost romantic, rather than empirical, appraisal of judicial capacities. It could also justify some ideas about what in

¹³² As observed by M. YAHAV, *Organizations of Law* (quoted), 25, “*the legitimacy of the practice of judicial review is not an abstract question, but rather institutionally and organizationally sensitive: any account of what judges ought to do (all things considered), will depend both on the organizational makeup of the particular legal order and political arguments about the considerations on which judges must rely*”.

¹³³ On the specific interpretative and systematizing tasks of legal science, as a part of legal practice, see K. TUORI, *Critical Legal Positivism*, Aldershot, 2002, 143 f.

¹³⁴ A. VERMEULE, *Judging Under Uncertainty. An Institutional Theory of Legal Interpretation*, 15.

¹³⁵ *Ibidem*, 36.

fact the role of judges should be. As he states, “*to minimize their interpretive ambitions, especially by minimizing the costs of judicial decision making and of legal uncertainty*”¹³⁶, ought to be what judges do. The relative insulation and resulting “informational deficits” of judges suggest a commitment to interpretative formalism and textualism in an operational sense. Finally, what the institutional approach recommends is an appropriately “*modest judicial posture*”¹³⁷ and, in the statutory interpretation, “*a strong regime of agency deference*”¹³⁸, since agencies frequently have a more profound knowledge of facts and policies. In addition, the constitutional review of laws should be “modest”, as courts should enforce only “*the sort of clear and specific constitutional texts that tend to promote structural and coordinating goals*”. In any other case – e.g. when the constitutional norms contain “*gaps and ambiguity*” – courts must defer to the legislature, “*as an institution better placed to update the Constitution over time*”¹³⁹.

Probably, if Vermeule’s canon were a rule written in the Constitution, its interpretation – on the basis of the “clarity test” required by the canon itself – would not be the responsibility of courts, but of the legislature or agencies. However, my disagreement with his approach does not regard the theory of interpretation of legal texts, which is not the main focus of this paper, but the institutional perspective itself. Paradoxically, this perspective seems to lack real institutional consideration: Vermeule’s point of view is too one-dimensional and insufficiently comprehensive. Courts and legislatures are placed on the same level, as if they were two competitors¹⁴⁰. They are evaluated and then compared in terms of what they can do and the consequences that flow from their decisions. This ‘economic’ approach tends to confuse more than to clarify the institutional context, since it gives a far too flattened perspective¹⁴¹.

¹³⁶ *Ibidem*, 150.

¹³⁷ *Ibidem*, 227.

¹³⁸ *Ibidem*, 205.

¹³⁹ *Ibidem*, 233. Similar theses are developed in *Law and the Limits of Reason*, New York, 2009.

¹⁴⁰ This is a rather widespread perspective: cf. for example. A. MARMOR, *Interpretation and Legal Theory*, 2nd ed., Oxford and Portland, 2005, 149-155, and R. BELLAMY, *Political Constitutionalism*, Cambridge, 2007, esp. 26-48.

¹⁴¹ The Author shows evidence of realizing this in the subsequent volume (*The System of the Constitution*, Oxford-New York, 2011), where the constitutional system is broken down into several sub-systems, distinguishing the judicial system from that of legislation. We approve the Author’s emphasis in underlining the inadequacy of the traditional perspective, which concentrates on the single judge, rather

The institutional perspective can offer much more. In the institutional model recently proposed by Kaarlo Tuori, for instance, law is understood as “*a multi-layered normative phenomenon*”, where a superficial level, made up of legal practices (legislation, case-law and ongoing scholarly debate), is in a recursive relation with the “*sub-surface’ level of legal-cultural elements, such as general legal concepts and principles, legal theories or doctrines, and patterns of argumentation*”¹⁴². This model explains why courts and legislatures (or agencies) are neither similar nor same-level competitors. They match two different expectations and work in two different sub-systems.

Giving a general outline – which Vermeule would call “nirvanic”, perhaps – the legislative sub-system should have a commitment to pursuing policy goals through normative instruments. Here, we need a wider and comprehensive approach, as well as a thorough knowledge of social issues and policy costs. This is guided by an instrumental rationality¹⁴³, and its performance is evaluated through the ballot box, on which the legitimacy of legislature is grounded: millions and millions of citizens are affected by the laws it enacts, and they should be the only judges of how the legislature handles their rights and interests. At the same time, the judicial sub-system should be committed to ensuring that each individual has the rights the law provides; the judge deals with each case on its merits and strict procedural rules confine the judge to what is relevant to the case. Courts have to justify the *rationes* of each decision and each decision may be reviewed by another judge and debated freely in professional and academic arenas¹⁴⁴.

than on the system of judges (177 s.): his concerns are in keeping with our previous remarks with regard to the probability function in interpretation (see § 4).

¹⁴² K. TUORI, *Ratio and Voluntas: the Tension Between Reason and Will in Law*, Farnham-Burlington, Vt., 2011, x.

¹⁴³ An “*instrumentally-oriented voluntas*”, following the definition of K. TUORI, *Ratio and Voluntas*, 103.

¹⁴⁴ My distinction between the two sub-systems has a strong analogy (although a more modest purpose) with the COVER’s radical dichotomy between the social organization of *law as power* and the organization of *law as meaning*, which reflects in our contemporary experience the distinction between the *imperial* ideal type and the *paideic* one: *Nomos and Narrative*, 16-18.

Both sub-systems have to deal with rights and interests, and both are consequently connected with individuals. However, there is a basic difference between them, because the legislature looks at rights as a general and political issue, whereas courts look at one case at a time. This is hardly a novel observation:

While the statute, as a precaution, looks to the future and seeks to mesh with it, the judge has in front of him events and actions which are already part of the past and which are individualized in accordance with persons, place, time, and other circumstances. Because directed to the future, the statute anticipates classes of factual possibilities and contains conditional and abstract legal precepts. The judge, on the other hand, is always occupied with isolated concrete facts and has to find his legal orders unconditionally.¹⁴⁵

The two different perspectives should never be exchanged, as this would violate the principle of separation of powers. However, a short-circuit seems to occur in the case of judicial review of laws. Declaring a statute void, a court interferes within another sub-system, since its decision can have an effect which goes far beyond the narrower sphere of interest of the parties: a kind of *erga omnes* effect. Additionally, we also have to consider some other aspects of the issue.

Firstly, I would like to emphasize the importance of the normative frame which in every legal system defines what the judge should and should not consider. For instance, in order to refer a question to the European Court of Justice for a preliminary ruling, it is “*necessary to do so in order to resolve a dispute*”. The matter is brought before the referring judge, who has to “*explain the reasons which prompted the national court to raise the question of the interpretation or validity of the European Union law provisions, and the relationship between those provisions and the national provisions applicable to the main proceedings*”¹⁴⁶.

¹⁴⁵ O. von BÜLOW, *Gesetz und Richteramt*, 10.

¹⁴⁶ Quotations from *Information Note on references from national courts for a preliminary ruling* (2011/C 160/01)

In every legal system, it is up to law to set the limits of judicial power¹⁴⁷. For instance, the “concreteness” of the question that a judge can raise about the constitutionality of a statute is provided both in Germany¹⁴⁸ and Italy¹⁴⁹, where the judge is obliged to explain why the specific question raised is so “relevant” that it could not be resolved without a decision of the Constitutional Court. Spain¹⁵⁰ and France¹⁵¹ both have similar provisions. In the United States, too, the same principle is affirmed both in doctrine¹⁵² and in many decisions citing the famous list drawn up by Brandeis in the concurrent opinion in *Ashwander v. TVA* (1936). One version of it includes:

constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided.¹⁵³

It is, nonetheless, merely a statement of principle, in practice little acknowledged in Supreme Court adjudications, as shall be seen. Whatever the case, it does not resolve the problem of limiting the effects of a decision to a single case – since the declaration of unconstitutionality of a legal norm potentially has the same *erga omnes* effects as the law itself.

In civil-law countries, this is stated by the statute in judicial review procedure, and several mechanisms are provided in order to shape the legal effect of each type of

¹⁴⁷ See H. WECHSLER, *The Courts and the Constitution*, in 65 *Colum. L. Rev.* 1001 (1965), 1005.

¹⁴⁸ § 80.2, *Bundesverfassungsgerichtsgesetz*.

¹⁴⁹ Art. 23.2, Legge 87/1953.

¹⁵⁰ Art. 35.1, Ley orgánica 2/1979.

¹⁵¹ Art. 23-2, Loi organique n. 2009-1523.

¹⁵² See, for instance, H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1 (1959-1960), 6.

¹⁵³ *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947). On the equivalence between the legislative requirements in the German law and the maxims of judicial self-restraint of the Supreme Court see D. P. KOMMERS, *The Constitutional Jurisprudence of the FRG*, 2nd ed., Durham and London, 1997, 50.

judicial statement on the compatibility of a law with the Constitution. Unfortunately, not everywhere is the legislature mindful and ready to lay down rules on such issues, even though they are of basic importance for drawing clear lines of separation of powers among various state bodies. In Italy, where politicians have traditionally demonstrated more irritation than sympathy towards issues connected to judicial review of laws¹⁵⁴, the Constitutional Court itself has provided arrangements for curbing the effects of its own decisions. Through the so-called “*sentenze manipolative*”, the Court states that a law is unconstitutional only in the part it provides for (or does not provide for) a single specific norm¹⁵⁵. In this way, the Constitutional Court may look at an extremely limited case: the decision produces no consequence on the *textual* structure, while a single case is added to or removed from the *meanings* (norms) the interpreter is authorized to derive from that text¹⁵⁶. Similar techniques are also applied by the German and Spanish constitutional courts¹⁵⁷.

Common-law countries reveal quite different facets. The *erga omnes* effect of decisions is not a rule fixed by a statute, but is rather a consequence of the long-standing principle of *stare decisis*, firmly grounded in common law and – most think¹⁵⁸ – in American constitutional law, too. I take the liberty of advancing two considerations on this issue.

¹⁵⁴ The facts are clear if we compare Italy with Germany. The procedural regulation of the German Court (1951), has been modified several times, also to make a formal acknowledgment of practices the Court had developed – for instance – in order to widen the catalog of types of decision and to restrict the effects of them. The law on the Italian Constitutional Court (1953) has never been amended. The Italian Court – exactly like its German “sister” – has devised many new types of decision in order to escape from the rigid alternative yes/no answer to any question about the constitutionality of laws. In fact, as a reaction to an unwelcome decision, members of Parliament have put forward bills about it, but only to forbid the Court expressly from pronouncing something other than “yes” or “no”. None of them have been passed, fortunately.

¹⁵⁵ An example is the sent. 227/2010 that declares unconstitutional the statute which implemented the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, “*in the part it does not provide for the refusal to surrender a person who is actually resident in Italy, in order to execute the detention in Italy according to the national law*”. Also in the Italian literature this practice is characterized as “reconstructive surgery”, as it is defined by L. TRIBE, *American Constitutional Law*, (2d ed.), Mineola, N.Y., 1988, 1027.

¹⁵⁶ Sometimes the decision may affect a small number of people: see *e.g.* the sent. 72/1987, which probably affected only the few plaintiffs in a labour-law matter.

¹⁵⁷ See A. R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators in Comparative Law*, XVIII International Congress of Comparative Law, International Academy of Comparative Law (Washington July 26-30, 2010) – General report, 76 f. (paper).

¹⁵⁸ See R. H. FALLON, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 *N.Y.U. L. Rev.* 570 (2001).

First, as Jeremy Waldron has recently remarked, in the *stare decisis* system the institutional dimension of adjudication is highly evident. A principle of “*institutional responsibility*” is clearly affirmed which requires all judges, both the judge who states the precedent and all other subsequent judges, to conduct themselves in such a way that “*the court to which they all belong will be (and be seen as) an institution that decides cases on a general basis, rather than just an institutional environment in which individuals make particularized case-by-case determinations*”¹⁵⁹. The later judge “*must think of himself as acting in the name of the self-same entity that decided the case that came before*”¹⁶⁰.

Although it is commonplace to emphasize the structural differences between the common and civil law systems both for the authority of judicial precedent and for the pattern of judicial review, “institutional responsibility” could be the title of the body of rules that the European high courts have developed for regulating “cooperation” among judges. The issue is too complex to discuss fully here, but perhaps the most obvious difference is that institutional cooperation in Europe is clearly evident in the “vertical” relations between judges and higher courts (lower courts and Constitutional Court, or national judges and European Court of Justice)¹⁶¹. It is much less evident in the “horizontal” relations between judges at the same level. Some reasoning matrices I have hinted at – for example, interpretation “in accordance to”¹⁶² – are favoured settings for “vertical” cooperation.

This all suggests that, more than the awareness of belonging to the same institution, what really matters is authority. Authority is what makes the difference in a system where each and every judge is “subject only to law” and his/her autonomy in

¹⁵⁹ *Stare Decisis and the Rule of Law: A Layered Approach*, 25.

¹⁶⁰ *Ibidem*, 28.

¹⁶¹ On the contrary, following the nonconformist view of the American judicial system suggested by A. VERMUELE, *Judging Under Uncertainty*, 130, “*the picture of a centralized, hierarchical judiciary is fantastic*”, because it omits “*a number of institutional fault lines internal to the structure of judicial institutions that hamper judicial coordination on interpretive strategies*”.

¹⁶² On the necessary cooperation in it, see L. KUHLEN, *Die verfassungskonforme Auslegung von Strafgesetzen*, 13 f.

interpreting the law is guaranteed by the Constitution itself.¹⁶³ The “authoritarian” aspect of cooperation is evident also in the relations between national judges and the European Court of Justice, which has stated that a manifest disregard of its own case-law by a national court adjudicating at last instance may make the member State liable for a breach of Community law¹⁶⁴.

On the other hand, the European Court has the institutional character of the judicial framework as a whole clearly in mind. In a recent opinion on a draft agreement for the creation of a unified patent litigation system (which proposed conferring exclusive jurisdiction on an international court to hear actions brought by individuals in the field of the Community patent law), the Court observed that such an agreement

would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law¹⁶⁵.

In short, differences do matter, but a clear commitment to “institutional responsibility” seems to be in either case a marked feature of the judicial sub-system.

The second consideration regards the regulation of the effect of decisions. The principles of common law have not impeded some countries (like the United Kingdom and Canada) from adopting a legislative regulation of the effects of judicial review of legislation for its conformity to individual rights. Such arrangements tend to assign to Parliament, rather than courts, the last word in decision-making which involves rights.

¹⁶³ Despite this, sometimes authority does not cancel out the egalitarian drive underlying the concept of ‘cooperation’: if ordinary judges “defer” to the interpretation given, for instance, by the Constitutional Court, this too defers to the “living law”, which is the specific interpretation of a statute laid down by the case-law of the ordinary courts. See A. PUGIOTTO, *Sindacato di costituzionalità e "diritto vivente"*, Milano, 1994.

¹⁶⁴ See judgment in Case C-224/01 (*Köbler*), C-173/03 (*Traghetti del Mediterraneo*) and C-379/10.

¹⁶⁵ Opinion 1/09 of the Court (Full Court) 8 March 2011 (§ 89).

Nonetheless, similar outcomes are possible in continental European systems too, as one can see, for example, in Germany¹⁶⁶. On the other hand, if the institutional system is working correctly and, consequently, every negative judicial decision about the compatibility of a law with the higher norms is promptly followed by a legislative reform – as occurs in the UK and Germany – the real result of such an arrangement is more formal than substantive¹⁶⁷.

The issue does not reside in this question, but more probably in the preliminary question of whether a Bill of Rights, if enacted, has to bear on judicial decisions as a normative and super-legislative binding act or not. In other words, who has the power and the duty to grant the individual his/her rights, and by what means can they be enforced? It is a vast issue, which – fortunately – does not fall within the scope of my paper, except obliquely. I shall return to this point after a brief digression on the relationship between case, sentence and motivation.

9. Mr. Mani and the rhetoric of judgments

Ronald Dworkin has used the well-known metaphor of the chain novel to describe the development of legal precedents¹⁶⁸. The image is suggestive, but needs to be used with caution. Judgments are rhetorical acts, which are directed to a specific audience. The same judge does not always address the same audience, even if the subject of the ‘novel’ may appear to be the same. Therefore, reading his/her judgments as if they were episodes of the same novel could prove highly misleading. Unfortunately, it is an error that crops up rather frequently in comments on judgements.

Take for example the German Constitutional Court. Sometimes it issues very strongly motivated decisions, with hundred and hundred pages of high doctrinal reasoning, which seem to represent a narrative *coup de scene* considered by all to be the “decisive”

¹⁶⁶ I am referring to decisions which declare the law “incompatible” (*unvereinbar*) with the Constitution, and not “void” (*nichtig*), leaving to the legislature to find the way of correcting the questioned law.

¹⁶⁷ See M. TUSHNET, *Weak Court, Strong Rights*, 27-31 (reasoning about the British HRA 1998) and 43 ff. (discussing the Canadian experience).

¹⁶⁸ R. DWORKIN, *Law's Empire*, 228-38 (1986).

episode of the saga. Then, just a few day's later, the same court might issue a much less richly argued decision, seemingly moving in a different direction altogether, thus re-entangling the "chain".

The case-law on European integration is characteristic. Some very famous decisions, like *Maastricht* and *Lissabon*, each of which is generously argued on the highest doctrinal and theoretical level, have been seen as interrupting the court's long-standing trend of favouring an increased integration of the German legal order in the European one. Instead, just a few days later, the *Bundesverfassungsgericht* reassured commentators by issuing new decisions – like the *Mangold Urteil* – which resumed the old chain, the traditional *Europarechtsfreundlichkeit*¹⁶⁹. Such are the dramatic effects of an uninformed reading of a bogus chain-novel¹⁷⁰.

The German example seems very meaningful. In Germany, the most influential and "doctrinal" constitutional decisions are issued in cases submitted through two specific instruments, the direct Constitutional complaint (*Verfassungsbeschwerde*) and the complaint of a *Land*, the *abstrakte Normenkontrolle*. Not only well-known questions about European issues, from the *Solange* to *Lissabon* decisions, but also fundamental cases about constitutional rights have been decided in *Verfassungsbeschwerde* (e.g., the mythical *Lüth Urteil*, usually deemed as the most important judgment on freedom of speech) or in *Abstrakte Normenkontrolle* cases (e.g., sentences on sensitive issues of the past, like abortion, or the recently issued ones on preventive detention and genetic engineering).

In the *Verfassungsbeschwerde*, the German Court picks and chooses those few constitutional complaints that it considers important: but it is not totally free in its discretion, because some complaints are of strong political relevance, also because the proposer may be a constitutional body or a political organization. In such cases, as in others when the complaint is raised by the leader of a *Land*, the questions submitted to

¹⁶⁹ J. ZILLER, *The German Constitutional Court's Friendliness Towards European Law*, 16 *European Public Law* 2010, 53.

¹⁷⁰ See R. BIN, *Gli effetti del diritto dell'Unione nell'ordinamento italiano e il principio di entropia*, 367-369.

the Court are formulated in highly general and “political” terms, and not in strict connection with a specific case of concrete application of rules, as instead occurs in the field of *konkrete Normenkontrolle*¹⁷¹.

As a result, the “doctrinal” character of German Constitutional Court decisions does not depend on a stylistic choice of the Court, but more on the circumstances under which the Court has to operate. In such conditions, the German Court cannot try to tie its decision and respective motivation to a specific, concrete case: the question arises as an institutional, general, political one, and the Court has to answer in clear institutional, general, “doctrinal” terms. And – what is more remarkable with regard to the cases on matters of European integration – the answers depend strictly on the question posed. It must make recourse to established dogma, to traditional and widely accepted concepts, and reconstruct a general institutional framework on their basis. They are never easy sentences to write, but neither are they revolutionary. When the question posed to the Court concerns state sovereignty, and therefore probes the labyrinthine depths of constitutional theory (where concepts like sovereignty are perhaps more theological than legal), the answer cannot be anything other than theoretical and abstract¹⁷². Everything changes when equally abstract and important issues are raised in scenarios where much more concrete cases are referred for review by judges. The doctrinal context fades into the background or is merely an outline, and the language becomes more technical, as is to be expected in a discussion among judges on questions that are sufficiently concrete as to be dealt with by adjudication.

The moral of the story is that the answer always depends on the question. In one of his unforgettable novels – *Mr. Mani* – Abraham Yehoshua traces the history of an Israeli Hebrew family back through generations. He writes a series of dialogues in which the reader hears only one side of the conversation and must infer the words of the other speaker. Sometimes, judgments are similar rhetorical acts, in which the judge responds

¹⁷¹ On the different meaning of “abstract” and “concrete” judicial review in America and Europe, see A. STONE SWEET, *Why Europe Rejected American Judicial Review - and Why it May Not Matter*, 101 *Mich. L. Rev.* 2744 (2003), 2772-2778.

¹⁷² The lesson to be learned from constitutional history is that it is best not to comment on the latest questions concerning sovereignty: cf. M. FOLEY, *The Silence of Constitutions*, London-New York, 1989.

to questions that are not adequately expressed, which cannot be fully understood, without knowing by whom, how and why they were formulated in the first place.

The jurisprudence of the Italian Constitutional Court is also marked by important differences in language, doctrinal engagement and even the perception of problems: they depend above all on the type of procedure in which the Court is operating. When the Court addresses sensitive questions arising in jurisdictional disputes between branches of government (so-called *conflitti di attribuzione*), theoretical concerns are often to the fore, as is the effort generally to collocate the answer to the claim raised by (or against) a political organ within a highly theoretical institutional framework. By contrast, very different language and theoretical tools are employed by the Court in proceedings concerning jurisdictional disputes between the State and the Regions: in such cases, the Court drastically reduces the breadth of the theoretical perspective, programmatically restricting itself solely to issues directly concerning those to whom the competence belongs¹⁷³. By contrast, if the claim is lodged by judges in an *incidenter* proceeding, only very rarely do questions arise relating to the constitutional framework of powers of constitutional organs or the definition of regional jurisdictions¹⁷⁴. In such cases, where the only interlocutors are ordinary judges, both language and reasoning become technical, as any overly “doctrinal” treatment would be out of place.

Thus, the question determines the language, the argumentation, and theoretical complexity of the answer. There is more, however, as can be well appreciated by considering, in particular, the *incidenter* proceeding concerning the legitimacy of laws, generally a form of judgment in which the object of the question specifically regards the

¹⁷³ An emblematic case is the double vision emerging from a comparison between sent. 249/2009 and sent. 28/2010: the two rulings referred to the same object, a state law contrasting with a European environmental rule. The second decision, in response to a question raised by a judge, was acclaimed by the doctrine as a great and courageous honoring of EU law (since it overcame the traditional caution with regard to ruling on questions arising from “guaranteeist” criminal norms); the first, raised by a cross appeal on the part of several regions, was ruled inadmissible, since the regions’ interest to appeal was unclear: it was as if this consideration prevailed over the general interest with regard to the commitments undertaken within the European Union.

¹⁷⁴ An important case, in this regard, is sent. 171/2007, which reforms the law controlling the abuse of emergency law decree, drawing arguments from the principle of the division of powers and its implications in the safeguard of rights. It is relatively rare for the Court to uphold claims relating to state /regional jurisdiction in cross appeals lodged by judges.

constitutional rights of individuals¹⁷⁵. In the interlocutory procedure, the terms in which the Court expresses itself are determined by the case at hand: the object of the question must – by virtue of *principle of relevance* – be intrinsic to the question addressed by the judge *a quo* in the main trial. On its part, the Court is bound by the *principle of correspondence*¹⁷⁶ and cannot express itself beyond the limits of that object: there has to be perfect correspondence between the question that was put to the Court and the answer the Court gives in its decision. Neither is the Court allowed to evade judgement, except on the grounds of purely technical reasons: there are, in fact, instruments capable of accelerating answers to badly formulated questions or ones that have already received an answer, but the Court has no possibility of selecting questions, and excluding those that do not seem sufficiently important. Such selection exists in Germany and Spain, when the private citizen may adopt the instrument of *direct appeal* to the Constitutional Court (i.e. not filtered by the control of an ordinary judge): it involves an arduous process and admits a minimal percentage of appeals, deemed to be of “particular constitutional relevance”¹⁷⁷. However, when it is the judge who, in the course of a proceeding, questions the constitutionality of a law, and does so through a proper claim without omissions or errors, the Court is bound to adjudicate on the specific case. The “institutional collaboration” is strong and systematic, since the judge has no other way of freeing him/herself from the tie anchoring him/her to a law, even if

¹⁷⁵ This is also true in Germany and Spain, where, however, alongside the interlocutory procedure, the private citizen may also make direct appeal to the constitutional judge to claim the violation of his/her rights by a State body – very often a jurisdictional organ.

¹⁷⁶ *Ne eat iudex extra petita partium* is a principle that “has the function of circumscribing to what is strictly necessary the Court’s power to cause the annulment of laws and legal norms” (C. CRISAFULLI, *Lezioni di diritto costituzionale*, II, Padova, 1984, 379). However, the correspondence principle could also be expressed as the Constitutional Court’s obligation to adapt the principles and even constitutional language (where, for example, it expresses judgments of reasonability, proportionality, or balancing of interests – namely, those previously mentioned as characteristic *hard cases*) to the normative framework and language of the ordinary judge and his “case”. Interestingly, seen in this way, it seems to coincide with the meaning assumed by the “correspondence principle” in quantum theory: the results of quantum mechanics must correspond those of classical mechanics and be expressed in the classical language; quantum theory can constitute a rationalization of classical theories. It is difficult to go beyond this analogy, however, also because the correspondence principle, enunciated by Niels Bohr on several occasions, remains a rather cryptic concept, even to physicists themselves.

¹⁷⁷ This is expressed in art. 49.1 and 50.1b of the *Ley Orgánica* 2/1979, after the revision of law 6/2007. The hypothetical situations in which this requirement might arise are carefully specified by the ruling of the *Tribunal Constitucional* of 2009 (STC 155/2009). With regard to the admissibility of the *Verfassungsbeschwerde*, similar terms are adopted in § 93a Abs. 2 *BVerfGG*: cf. sentences *BVfGE* 90, 22, 24 s. and 96, 245, 248 ff.

it is deemed anticonstitutional (and cannot be “reconciled” through the normal instruments of interpretation). The question is followed by the answer, and the answer must “lie within” the question.

The European jurist cannot fail to be awed by the absolute discretionality with which¹⁷⁸ the American Supreme Court now filters the questions it intends to address – discretionality probably unknown to any other judge in the world¹⁷⁹. If only around 1% of cases obtains the *certiorari*¹⁸⁰ – a percentage even lower than the *direct appeals* of citizens accepted in Germany and Spain – it suggests that the collaboration between state and federal judges has definitively broken down. The function that the Supreme Court recognizes itself as having, is not to resolve a doubt raised by a preliminary judge and answer the question posed by the judge or parties before law, so as to allow the continuation of that judgement. Instead, its role is to interpret law in relation to a problem that it holds to be (although it is unclear on what grounds) sufficiently important¹⁸¹. The “case” is selected for review for extrinsic reasons, including the absence of procedural or factual complications or the clarity of the problem to resolve¹⁸²:

¹⁷⁸ On the (also legislative) evolution of the Supreme Court’s discretionary powers in selecting *certiorari*, cf. E. A. HARTNETT, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, in 100 *Colum. L. Rev.* 1643, 1645 (2000); W. BOSKEY, E. GRESSMAN, *The Supreme Court Bids Farewell to Mandatory Appeals*, in 121 *F.R.D.* 81 (1988). In particular, on the origin of the *Judges’ Bill* of 1925, cf. J. STERNBERG, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, in 33 *Journal of Supreme Court History*, 1, 1.

¹⁷⁹ As claimed by S. LEVINSON, *Assessing the Supreme Court’s Current Caseload: A Question of Law or Politics?*, in *Yale L.J. on line*, 119, 99 (2010), 101.

¹⁸⁰ Statistical data on the role of the Supreme court are provided and commented by K. W. STARR, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, in 90 *Minn. L. Rev.* 1363 (2005-2006), 1369; W. W. CORDRAY, R. CORDRAY, *The Supreme Court’s Plenary Docket*, 58 *Wash. & Lee L. Rev.* 737 (2001); D. M. PROVIN, *Case Selection in the United States Supreme Court*, Chicago-London, 1980, 18 ff. See also, for a thematic analysis of the cases admitted for review, R.J. OWENS, D.A. SIMON, *Explaining the Supreme Court’s Shrinking Docket*, 53 *Wm. & Mary L. Rev.* 1219 (2011-2012), and for an analysis of the case-loads of single judges D.R. STRAS, *The Supreme Court’s Declining Plenary Docket: A Membership Based Explanation*, in 27 *Const. Comment.* 151 (2010-2011).

The parallel between the *writ of certiorari* and the discretionary filter that the German Federal Constitutional Court applies to direct constitutional appeals is discussed by M. KAU, *United States Supreme Court und Bundesverfassungsgericht*, Berlin-Heidelberg-New York, 2007, 423 ff.

¹⁸¹ In this regard, cf. the critical discussion of F. SCHAUER, in *Is It Important To Be Important? Evaluating the Supreme Court’s Case-Selection Process*, in *Yale L.J. on line*, 119, 77 (2009).

¹⁸² On case selection strategies, cf. M. M. CORDRAY, R. CORDRAY, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, in 69 *Ohio St. L. J.* 1 (2008); ID., *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, in 82 *Wash. U. L. Q.* 389 (2004); R. L. REVESZ, P. S. KARLAN, *Nonmajority Rules and the Supreme Court*, in 136 *U. Pa. L. Rev.* 1067, (1988).

“individual cases are seen as fungible; it is the issue that the case raises that is important, not the case itself”¹⁸³. It is the Court that chooses the “vehicle” that brings the problem to its attention, and therefore also the “facts” from which to start.

The phenomenon becomes even more surprising if we consider Court’s tendency not only to choose if and when it will consider a question, but also to reformulate the question itself: for some time now, the Court has claimed the power to single out from the cases accepted for review, only the specific problem that appears to be of interest, while ignoring the others¹⁸⁴. It even goes so far as to modify the question¹⁸⁵, introducing entirely new questions that are not strictly linked to the facts considered in the main trial¹⁸⁶. In doing so, it calls upon the parties and *amici curiae*¹⁸⁷ to present additional memorials on points they had not considered, being outside the province of the case. Thus, the judge’s need to resolve the question for “his” case is in conflict with the Court’s freedom of choice to review the question that it deems “important”, when and how it prefers. In this scenario, the Court members are clearly acting more as members of a legislative body, free to devote themselves to “*issue creation*”, rather than judges who must respond to issues submitted to them, within the limits of the “case” at hand¹⁸⁸.

If the interlocutors of European Courts, at least in cross appeals (which comprise the vast majority of rulings), are ordinary judges (and the citizens who have turned to them in order to claim their rights), who, then, are the interlocutors of the Supreme Court? Its audience clearly seems to comprise the entire public, and, therefore the Court addresses

¹⁸³ H. W. PERRY Jr., *Deciding to Decide. Agenda Setting in the US Supreme Court*, Cambridge, Mass.,- London, 1991, 220.

¹⁸⁴ Cf. E. A. HARTNETT, *Questioning Certiorari*, 1705.

¹⁸⁵ Cf. E. A. HARTNETT, *Questioning Certiorari*, 1707.

¹⁸⁶ Cf. the critique of M. L. MOSES, *Beyond Judicial Activism: When the Supreme Court is No Longer a Court*, in 14 *U. Pa. J. Const. L.* 161 (2011), which highlights how this has occurred even in cases of crucial political importance, such as *Citizen United v. Federal Election Commission* (175 ff.). Also in recent cases concerning health service reform, the government successfully requested the Supreme Court to deal with questions not discussed by the parties: cf. H.P. MONAGHAM, *On Avoiding Avoidance, Agenda Control, and Related Matters*, in 112 *Colum. L. Rev.* 665 (2012), 665 (and, for other more general examples in this regard, 680 and 689-691).

¹⁸⁷ On the role of *amici curiae*, through which interest groups operate, in case selection, cf. G. A. CALDEIRA, J. R. WRIGHT, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, in 82 *Am. Pol. Sc. Rev.* 1109 (1988).

¹⁸⁸ Cf. L. EPSTEIN, J. KNIGHT, *The Choices Justices Make*, Washington, DC, 1998, 160.

public opinion and political institutions, eschewing the specialized language of technicians, in favour of an idiom that can be well understood by the mass media. Rather than reviewing the cases referred to it by other judges, it tends to exploit its flexible agenda to rule on “controversial questions” that it considers important¹⁸⁹. It has even been claimed that Supreme Court rulings, aside from the merits of the decisions, contribute to raise public awareness of certain issues, thus setting the country’s political agenda¹⁹⁰. The enormous increase in *plurality* and *dissenting*¹⁹¹ rulings seems to fit in with this remarkable evolution (at least, in European eyes).

Unbound from the concrete case, free to expand or modify the boundaries of the question it chooses to tackle, released from the self-restrictions imposed by *Ashwander*, the Supreme Court is, however, exposed to increasingly severe criticism, not only of its concrete actions, but also of its very role and legitimacy. In the United States a broad front has formed among scholars¹⁹² who are highly critical of the role of justices, even questioning the justifiability of judicial review itself. The “celebration” of the bicentenary of *Marbury v. Madison* (with nearly every legal magazine devoting a special supplement to it) added kindling to the critical debate on the “invention” of the judicial control of the constitutionality of laws. The sentence is considered to be a “landmark” that laid the basis of constitutional law¹⁹³; but it is also suspected of being the origin of a deviation from the democratic rule, according to which it is the people, through their

¹⁸⁹ Cf. E. A. HARTNETT, *Questioning Certiorari*, 1733 s.; K. W. STARR, *The Supreme Court and Its Shrinking Docket*, 1366.

¹⁹⁰ Cf. E. A. HARTNETT, *Questioning Certiorari*, 1738.

¹⁹¹ Cf. L. EPSTEIN, J. KNIGHT, *The Choices Justices Make*, 40 ff.

¹⁹² B. FRIEDMAN, *The Will of the People*, New York, 2009, 7, observes that for the first time in American history, the Supreme Court’s power to review laws is simultaneously under attack from both sides of the ideological divide.

¹⁹³ “Take away *Marbury*, and constitutional doctrine as we know it would disappear”: FALLON Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, in 91 *Cal. L. Rev.* 1 (2003), 4. In reality, examples of judicial review of legislative acts were undoubtedly present (and well known to framers during the constitutional discussion) long before *Marbury*: cf. B. FRIEDMAN, *The Will of the People*, 25 ff.; for precedents also in English law, cf. P. HAMBURGER, *Law and Judicial Duty*, Cambridge, Mass.-London, 2008 – heralded by the essay of the same title in 72 *Geo. Wash. L. Rev.* 1 (2003-2004) – who contests both the thesis of the “invention” of judicial review by the Marshall Court, and the traditional one that holds that it is entirely extraneous to previous US legal system: against the latter view, Hamburger considers that Constitution’s silence on this matter to be an implicit acceptance of the obvious, i.e. that laws contrasting with the Constitution should be considered invalid.

representatives, who in the course of time choose the interpretation to make of the Constitution, and who decide how best to defend their rights. Also thanks to the specific structure attributed to it by the Constitution, and to the enormous difficulty involved in amending the latter, the Court has appointed itself to decide on issues that could, and should, be left to politics¹⁹⁴. Thus, critical voices are gathering to question the need for a form of judicial review that may even have the power to annul laws. Why is this necessary, it is asked, in an institutionally guaranteed democratic system – with an efficient electoral system, a judicial order to safeguard the rule of law, and a public opinion that is committed to individual and minority rights, albeit pluralistically divided as to their respective implications?¹⁹⁵. On the contrary, perplexity has even been expressed as to the very fact that rights are inflexibly enshrined in the verbal form of a bill of rights, which – being set on a higher level in the hierarchy of sources – constitutes a legal restriction to ordinary legislation, preventing it from performing its normal function of legal reform and innovation¹⁹⁶.

The specific normative and institutional context in which the Supreme Court is left to operate does not seem to be called into question. The breakdown in the close relationship of collaboration with preliminary judges favours both the cases of denied justice, so frequent because of the discretionality of certiorari, as well as the self-referentiality of the Court, substantially free to pick the laws to discuss and to revoke by a ruling of unconstitutionality. Clearly, the democratic “difficulty” of the Supreme Court

¹⁹⁴ Cf. in this regard L. D. KRAMER, *The People Themselves*, New York, 2004, (the almost verbatim quotation on p. 251), which constitutes a fine example of such criticism.

¹⁹⁵ For this thesis cf. above all J. WALDRON, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346 (2006): “We are to imagine a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.” A society thus constituted “ought to settle the disagreements about rights that its members have using its legislative institutions. If these assumptions hold, the case for consigning such disagreements to judicial tribunals for final settlement is weak and unconvincing, and there is no need for decisions about rights made by legislatures to be second-guessed by courts.” (1360). See also R. BELLAMY, *Political Constitutionalism* (quoted).

¹⁹⁶ Cf. J. WALDRON, *A Right-Based Critique of Constitutional Rights*, in *Oxford Journal of Legal Studies*, 1993, 18 ff.

gradually increases as the typical jurisdictional controls are weakened, eventually modifying the institutional framework in which it operates.

To remedy this situation, however, is it really necessary to doubt the legal force of the Bill of Rights or abolish judicial review¹⁹⁷? The concluding remarks of this essay take their cue from an answer to this question.

10. *Hamster wheels*

Mr. E. had a daughter, who had been in a vegetative state for sixteen years, following a car accident. Mr. E. requested the civil court to have her feeding tube removed and to allow her to die “naturally”: a tragic case, like many others around the world, from the Terry Schiavo case on. The civil court responded that: (a) there was no legislative norm regarding the case; (b) an ordinary judge could not take a decision that, in suspending artificial feeding, would certainly cause the death of the patient. Quoting a decision of the ECHR¹⁹⁸, the court denied that a “right to die” was established, and added that between the right to live, on the one hand, and the right of self-determination and refusal of medical treatment, on the other, the former must always prevail¹⁹⁹.

This decision was reversed by the supreme civil court²⁰⁰. The court says: (a) art. 32.2 of the Italian Constitution²⁰¹ allows the individual the right to refuse medical treatment even if it means death; (b) the total legal incapacity of a person entails the establishment of a plenary guardianship, which is directed to protect the life of the person, but does

¹⁹⁷ Cf. in this regard, explicit from the very title, M. TUSHNET, *Abolishing Judicial Review*, in 27 *Const. Comment.*, 581 (2010-2011).

¹⁹⁸ Decision April, 29 2002 (*Pretty c. Regno Unito*: appl. no. 2346/02).

¹⁹⁹ Corte d’Appello di Milano, decreto 16.12.2006, *Foro it.*, 2007, 571.

²⁰⁰ Corte di Cassazione, sez. I civ., sent. 16 October 2007, n. 21748 (http://it.wikisource.org/wiki/Sentenza_corte_di_Cassazione_n.21748/2007).

²⁰¹ “No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person.” (trans. by Senato della Repubblica: http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf). Beside the constitutional norms, the international agreements, the Italian constitutional and ordinary case-law, the precedents of international courts, the court quotes also the decision of the US Supreme Court *Vacco v. Quill*, 521 U.S. 793 (1997) for the plain difference between “killing” and “letting die.”

not also imply the right of an arbitrary decision to cause the death of the incapacitated individual; (c) however, the guardian is the interpreter of what were the express wishes of the patient while competent²⁰².

Having demonstrated that his daughter would have chosen it, had she been able to express herself, Sig. E. was authorized to withdraw life-support. Thus, treatment was suspended and the poor girl died.

Public opinion was deeply divided. Parliament was incapable of passing a law because of the profound divisions not only among the parties but also within each of them. Some exceptional differences of opinion were also evident among the constitutional bodies. Parliament appealed to the Constitutional Court, pleading that the civil court had encroached on the legislative function by enacting a general rule, thus assuming the role of the legislature. The Constitutional Court dismissed the plea, however, pointing out that nothing prevented Parliament from passing such a law; at the same time, Parliament cannot interfere with the way judges carry out their work.

It is debatable whether Italy is one of the few countries which could aspire to fulfilling the conditions that Jeremy Waldron refers to in his “four assumptions”²⁰³. However, the real issue is this: why should Mr. E. be interested in that? He is not really committed to changing the laws of his country, but is asserting an individual right on the basis of a constitutional norm; and he is asking whether he has the right to act in the name of his daughter. “Don't worry, in a couple of years a law will give you an answer, probably”, would not be a satisfactory answer for him.

The ballot and the recourse are both devices available to the individual, but – as I have argued earlier – they trigger two wholly different processes, albeit both related to the interests of the individual himself. “*Without an available and enforceable remedy, a*

²⁰² The court quotes expressly some precedents of other national supreme courts, and particularly *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

²⁰³ See note 31 of the previous section.

*right may be nothing more than a nice idea*²⁰⁴: what one power produces (whether on the constitutional level or lower one) must be granted through the other. The idea that, in a well-run democracy with a developed society that is able to guarantee an ordered unfolding of the democratic process, the *rule of politics* can substitute the *rule of law*, comes to close for comfort to the myth of free market self-regulation, the will of the vote substituting that of the “invisible hand”²⁰⁵.

Another important aspect emerges. Mr. E. asked for an answer to his very *particular* question, and the judges had both the duty and the ability to answer in terms strictly pertaining to that question. The legislature has a quite different approach: members of Parliament (just as the people they represent) have debates about ultimate values and conflicting opinions about rights *in general* – while courts deal with the interests of the *single* person in the *specific* case.

“*The relation between opinions and interests is a complex one*”²⁰⁶. This is so, and the incommensurability of the judge’s and legislature’s jobs is a necessary consequence of that. When disagreement about conflicting values becomes fierce, the need for a framework of clear and stable principles becomes paramount. If the political system functions properly, the majority opinion can easily be reflected in a change of the law. But would it be appropriate for Mr. E. to be given an answer about his rights which could change after every election? Principles – not only *constitutional* principles – give rights more stability. This has been the function of the Constitution since its very origin: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts”²⁰⁷.

²⁰⁴ B. FRIEDMAN, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 *S. Cal. L. Rev.* 735 (1992), 735 f.

²⁰⁵ Thus, D. COLE, *Are We Stuck with the Imperial Presidency?* *New York Rev. of Books* 10/2012, 62, 63 (reviewing E. A. Posner, A. Vermeule, *The Executive Unbound: After the Madisonian Republic*).

²⁰⁶ J. WALDRON, *Law and Disagreement*, 14.

²⁰⁷ U.S. Supreme Court, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), 638.

In principle, therefore, the distinction between the tasks of those who produce general abstract laws and those who apply them to concrete cases, is clear enough: there is no reason for competition between two powers. However, one critical point exists.

A piecemeal approach of judges in rights enforcement cannot be acceptable if it is not founded on a *ratio*, a general rule, which declares what a right is, on a general normative level²⁰⁸; and the *ratio* aspires to become a precedent, a “holistic” statement about rights. But is this an encroachment on the legislature domain, as the Italian Parliament once believed? Absolutely not, because the “legislative” effects of a *ratio decidendi* is only a visual distortion: nothing will prevent the legislature from enacting its *voluntas* in new norms²⁰⁹ – complying with the constitutional restrictions²¹⁰, obviously, and that brings the role of courts back into the picture. At the same time, grounding a decision on the basis of a general norm is the way in which interpreters try to describe and justify their activities: it is the social aspect of interpretation, analogous in purpose to the mathematical formalization of a physics experiment. But the ‘experiment’ the judge is describing is the case at hand, to which he/she must be bound, since he/she has neither the necessary competence nor knowledge to go beyond the points actually argued before him/her.²¹¹

²⁰⁸ As noted by H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1 (1959-1960), 15, “To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?”

²⁰⁹ For an example of laws enacted in order to overturn Supreme Court judgments, see L. EPSTEIN, J. KNIGHT, *The Choices Justices Make*, Washington, D.C., 2008, 140.

²¹⁰ F. SCHAUER (*Judicial Supremacy and the Modest Constitution*, 1046) calls them “second order constraints on the first-order policy preferences of the people and of their elected representatives and executive officials”.

²¹¹ “The further a judgment goes beyond the points actually argued, the greater the risk there is of arguments being adopted without fully adequate consideration of all relevant circumstances and of possible counter arguments”: N. MacCORMICK, *Why cases have rationes and what these are*, in L. Goldstein (ed.), *Precedent in Law*, Oxford 1987, 155, 170. When the courts “decide issues that were not presented by the litigants as part of cases or controversies they brought to” them, they are no longer a judge but “politicians in robes”: L.M. MOSES, *Beyond Judicial Activism: When the Supreme Court is No Longer a Court*, in 14 *U. Pa. J. Const. L.* 161 (2011), 162.

“That is the separation of powers”, we could say, the structural tension between *ratio* and *voluntas* on which the system stands²¹². And the system can react strongly if the balance is upset. An excessive abridgment of civil rights by the legislature – or an excess of taxation for funding the enlargement of them – may be rectified by popular vote; in contrast, a tendency towards excessive normative ambition by some courts can certainly be discussed, and sometimes rectified²¹³, mainly by *critics*. Ultimately, it is public opinion that implements sentences, for a law will never last without consensus²¹⁴.

Critics affect *rationes* and the arguments used by courts for justifying every decision. Critics may warn the court not to cross the fine line beyond its own role and to stay instead within a rule-bound decision-making strategy. Critics may contest the role of a court that talks about rights but does not have the essential link to the specific cases and facts. It is the normal reaction of the “institution” to a court which, through too frequent and dramatic legal change, undermines the human need for predictability and stability²¹⁵. A clear awareness of roles and their limits matters considerably: “*the courts should be aware of their limits, and not act in ways which ‘waste’ their institutional capital.*”²¹⁶ The “institutional capital” is the precious treasure of the whole family, the common ownership of which all members are held to be trustees. It presupposes that certain commonly agreed practices of interpretation, adjudication and motivation form a common ground shared by parties, tribunals and scholars²¹⁷, combining to delineate also the judge’s function. Even those who argue against the very legitimacy of a forceful approach to judicial review of laws wish to avoid the derailment of the judicial branch from its line. And that may also be a way of exerting pressure on tribunals which are failing to stay within the limits of the case and begin talking the language of politics.

²¹² That opposition is manifest in the development of the *Rechtsstaat* theory: see K. TUORI, *Ratio and Voluntas*, 103.

²¹³ The oft-quoted historical example is the oscillation of Supreme Court jurisprudence on Roosevelt’s *New deal*: Cf. H. WECHSLER, *The Courts and the Constitution*, 1003 f.

²¹⁴ See B. FRIEDMAN, *The Will of the People*, 238 (quoting A. Lewis).

²¹⁵ S. G. BREYER, *Active Liberty: Interpreting our Democratic Constitution*, New York 2005, 119.

²¹⁶ R. GAVISON, *Role of Courts in Rifted Democracies*, 33 *Isr. L. Rev.* 230 (1999), 233.

²¹⁷ See N. MacCORMICK, *Rhetoric and the Rule of Law*, Oxford-New York 2005, 147-149.

Law is a complex institution. To someone who were able to fly away from the world of legal practice and scholarship, our constant efforts to submit court decisions to critical scrutiny might make us look like hamsters running round and round the wheel. Such an individual might be astonished to see so many human beings who run and run without – perhaps – realizing that, only thanks to their perpetual motion, the wheel goes on and on. It is not a useless effort however, for only this ensures the continual gyration of the wheel without it losing its balance.

11. Some Concluding Remarks

One might justifiably wonder whether to reach our conclusions it was really necessary to take the trouble of delving into quantum theory. Even this writer has often experienced a nagging doubt that physics could only lend us a few apt metaphors. The role of the “community of interpreters” in controlling the methodologies and results of judicial interpretation is by now an established fact of legal theory, one that is reached by travelling very different paths. Law – explained Aarnio²¹⁸ – is an *authoritative* instrument of social power: law, the interpretation and application of law form the chain transmitting power, making the “social” control of the outcomes of interpretation essential in the legal field. Just as the vote legitimizes legislative power, it is the community that confers authority on interpretations of judges: for they themselves belong by law to the “community”, and would lose their faculty to speak “with the authority of the law” if they disavowed the community’s authority²¹⁹.

But the “community of interpreters” is a sociological sphere, where the specificities of legal discourse are lost. Its vague and comforting character depends on its lack of heuristic contents; while providing reassurance, it does not offer a stimulus of further reflection. Quantum theory, too, often leads us to contemplate the concept of scientific community, as the testing ground of rules and theories. However, the hints it provides may help us to take several steps forward.

²¹⁸ See A. AARNIO, *Reason and Authority. A Treatise on the Dynamic Paradigm of Legal Dogmatics*, Adelshot, 1997, 95.

²¹⁹ O.M. FISS, *Objectivity and Interpretation*, 34 *Stanf. L. Rev.* 739 (1982), 747.

The first step leads us towards overcoming the *materialist ontology* that makes “law” a physical object independent of its interpretation and author. This is not the case, as we have attempted to show: the “law”, “norms in force”, “combined provisions” are the outcome of the interpreter’s options; he/she therefore *chooses* the object to interpret, and the “source” from which “to derive” the norm to apply to the case. The interpreter is part and parcel of the interpreted system: the judge not only confers *meaning* on certain documents issued by the legislator, but assigns to them the value, the *authority* to express that meaning and, hence, to constitute the source of the law that is to be applied, after having pronounced it.

The second step helps to surpass the vision, Kelsenian in origin, in which it is the sources of superior rank to guide the interpreter in the task of selecting and interpreting the norms to apply to the concrete case. The hierarchy of legal sources and other criteria usually employed to resolve conflicts among principles and identify the case norm, undoubtedly provide the interpreter with important guidance, especially in more ordinary cases: but the order they create is only apparent. The passage from the provisions (selected by the interpreter) to the law to apply to the “case” (constructed by the interpreter) is an entropic process, where the initial data and elements, well organized by those criteria, become so intermixed that they eventually disappear. The motivations of the decision cannot reverse “time’s arrow” and restore such elements, once lost. They are the justification of the work undertaken, rather than an exhaustive description of it. They are indispensable as an act of legitimation, but are unable to represent a process that is neither linear nor entirely measurable, in which entropy has the dominant part.

It is therefore inappropriate to head in the direction of overestimating the theory of legal interpretation and argumentation as the key to reading decisions issued, or as a useful guide in formulation the decisions to be issued. We can classify the data of departure (which are actually not “data”, being chosen and “mixed” by the interpreter), the result obtained (the sentence), and the arguments adopted to justify the passage from the former to the latter: but that is scarcely sufficient. The premises (“provisions of law”)

and conclusions (the sentence) are acts of power, having the nature of prescriptions; arguments are acts of reason, “rhetorical acts”²²⁰. If we look at a single sentence, we can hardly fail to be disappointed: we may approve of it and share the single arguments, but, clearly, there is more to it – that “more” which might be of interest to the psychologist, sociologist or political scientist, all figures legitimately engaged in finding out what it is that entropy has irremediably confused.

This urges us to take a further “quantistic” step forward (consoled by the knowledge that not only jurists are forced to take it). There is a dimension of law that cannot be explained by the classic language of legal interpretation, just as particle physics cannot be fully explained by the language of classical mechanics. Wondering whether reasonableness or balance tests are or are not a part of legal interpretation is a question of little significance. If “discovering the meaning of a legal text and discovering how to apply it in a particular legal instance are not two separate actions, but one unitary process”²²¹, then also in balance or reasonableness tests based on the principle of equality, judges determine the *meaning* of the constitutional provisions they are applying (the meaning of the principle of equality in relation to a specific context; the meaning of an “inviolable” right, balanced against that of another in a concrete case). However, the distance that separates the starting point (“data”) from the conclusion (the “case norm”) is such that entropy operates at its maximum and the classical language of interpretation is at pains to represent the process undergone. Thus, assuming a concept of interpretation that fosters expectations of certainty or the absolute of verifiability of the processes concerned, it is clear that such hopes will be sorely disappointed – just as the many attempts to describe quantum phenomena in terms of classical physics, have also failed.

The way out proposed by quantum theory is not to insist on scrutinising the single decision, with the pretence of understanding all of its passages and reconstructing every

²²⁰ I developed this distinction some while back in a work entitled: *La Corte costituzionale tra potere e retorica: spunti per la co-struzione di un modello ermeneutico dei rapporti tra Corte e giudici di merito*, in *La Corte costituzionale e gli altri poteri dello Stato*, A. Anzon, B. Caravita, M. Luciani, M. Volpi eds., Torino, 1993, 8 ff.

²²¹ H. G. GADAMER, *Truth and Method*, 309.

single argumentative thread (attempting to invert the irreversible direction of entropy), but to look at the body of cases, identifying constants and calculate probabilities. In brief, a full explanation of the phenomenon cannot be found in any individual ruling. That is why the institutional, “cooperative”²²² dimension of interpretation is so important.

Two consequences ensue. The first is that, even in the absence of a complete formal explanation of every single step, it is important that the science – in a collective sense – is able to ensure that the results of the trials examined are to some extent predictable. It may surprise us that this warning should come from a science that is “exact” par excellence and be applied to an eminently practical science such as law, whose values of expectancy, reliability and certainty seem engraved in its disciplinary protocols. The second consequence reminds us, once more, that we have to break free from the stereotype of the isolated interpreter, intent on examining an object from which he/she is detached, in order to establish its “objective” meaning. But it is not on the “objectivity” of the result that I want to insist on, since it is a highly implausible likelihood and, for some time now, has been unaccredited by dominant opinion: I prefer to draw attention to the other aspect, namely, the interpreter’s state of double isolation, cut off both from the object of his interpretation and from other interpretative processes.

Neither form of isolation is really plausible. On the one hand, there is the interpreter who modifies the object for interpretation – choosing it, deconstructing and reconstructing it, to the point that “objectivity” vanishes, to blend in with the interpretation “in accordance” with other norms. On the other, it is no less evident that the interpreter is accountable to the community for his/her work. The motivation of the sentence is a communicative act that is undecipherable in isolation from its context: there is no objective way to judge the “rightness” of a decision’s motivation considered

²²² The term is that of M. BARBERIS, *Interpretar, aplicar, ponderar. Nueve pequeñas diferencias entre la teoría genovesa y la mía, Diritto & questioni pubbliche*, 2011, 533 ff., 538-540.

alone, detached from the cultural precepts and deontological rules shared by the community.

Among the latter there are some that are decisive in defining the institutional role of the interpreter, and specifically that of the judge. I refer here to the procedural rules. They are imposed by the legislator, also to draw the boundaries within which the power of interpreters, judges in particular, must operate. What counts is not so much the adherence to the text written by the legislator (or deference to its *intent*), but rather the obligation that binds the judge's response to the question posed, the restriction to the facts and contours of the "case": the principle of correspondence between what is asked and what is decided and its implications in terms of the demarcation of the judge's task and his/her power of *ius dicere*. Pushing the analogy further, one might add that adherence to the "facts of the case", i.e. strictly to the case itself, has the same legitimising function as adherence to experimental data in scientific experimentation. *They* are the legitimate object of the observer's scrutiny, and any theory extrapolated must be weighed up against *them*. The same can be said of the judge, for he/she has no right to extend his/her interpretation beyond the boundaries of the facts ascertained before his/her court.

If sticking to the facts of the case and strict relevance to the issue at hand are identifying features of the judge's function, a consequence arises which is as obvious as it is important: all decisions having as major premise a principle of law – a general provision subsuming the individual one reproduced in the sentence – contain, even if only implicitly, the *rebus sic stantibus* clause. A recent sentence of the Italian Court of Cassation explains the restriction placed on review judges by the "principle of law" – which its sentences must express. It states that, when the Court sets aside a lower court's decision, the judge to whom the case is remitted "is bound to justify his/her opinion according to the *scheme* explicitly or implicitly enunciated in the sentence of annulment"; his/her assessment "must adhere to the outline" of the sentence of the

Cassation and “must be coherent with the principle of law expressed therein”²²³. The Cassation clearly explains the effects of its rulings in the exercise of its *nomofilachia* function (which should ensure that the law will be uniformly interpreted and applied), i.e. when it enunciates principles of law possessing all the requisites of actual legal norms²²⁴. In this case, as in the “additional” decisions of the Constitutional Court or in the interpretative ones of the European Court of Justice, we are looking at legal pronouncements which have, to all intents and purposes, characteristics entirely similar to those of legislation. It is hardly surprising that it is this type of judgement that is most frequently targeted by criticism and objections.

It must be remembered, however, that these sentences, too, implicitly contain a *rebus sic stantibus* clause. *Precisely because they are sentences*, namely decisions passed by a judge with regard to a topical and controversial concrete case, they evoke a general norm which is able to subsume the case specificities – the relevant aspects of the case for delimiting the abstract traits of the norm that is being formulated. Such specificities are aspects that summarise the factual particulars that the preliminary judge has indicated to justify and delineate the relevance of the question posed to the Court. The principle enunciated holds within these perimeters, and cannot expand further; the precedent also holds within these perimeters. The *rebus sic stantibus* clause relativizes the rule, whose validity is conditioned by the case and is therefore precarious in its nature, destined, that is, to be modified further with changing factual and legal circumstances. Legislative changes may also, in fact, alter the context. A new law cannot affect previous judgements, but it may withdraw the precedent’s *pro futuro* validity, setting up a new framework in which future adjudications will unfold.

The tension between the power to make laws and the power to interpret and apply them to concrete cases constitutes the balance of strengths which underpins the *Rechtsstaat*

²²³ Corte Cassaz., sez. Lavoro, sent. 18290/2012 (italics have been added).

²²⁴ This is particularly true for the “principles of law” enunciated by the Court of Cassation: as highlighted by M. TARUFFO, *Precedente e giurisprudenza*, Napoli, 2007 (but, in analogous terms, cf. also *Una riforma della Cassazione civile?*, *Riv.trim.dir.proc.civ.*, 2006, 735 ff., spec. 770 s.), they are meant to refer to *regula juris* in the abstract, unbound from the concrete facts of the case at hand (p. 17) and referring to all questions raised for any reason appeal, quite apart from their relevance in finding a solution to the case itself (p. 38 s.).

principle and gives meaning to the separation of powers. As is the case of the triangular trusses supporting arches, sometimes for centuries and centuries, the two rising beams meet at the centre and, there, exert their opposing forces: to obtain the correct equilibrium, the points where they are fixed to the base must be well distanced, and the anchorage must be firm. The architecture of the rule of law can only endure if the political-legislative role and the power of legal interpretation and application are set at an adequate distance on the base and solidly fixed to it. The procedural bond to the “case” is the key with which the buttress of legal interpretation *must* be soundly pinned to the architrave.

Marco Polo describes a bridge, stone by stone.

“But which is the stone that supports the bridge?” Kublai Khan asks.

“The bridge is not supported by one stone or another,” Marco answers, “but by the line of the arch that they form.”

Kublai Khan remains silent, reflecting. Then he adds: “Why do you speak to me of the stones? It is only the arch that matters to me.”

Polo answers: “Without stones there is no arch.”

(Italo Calvino, Invisible Cities)